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A

PRACTICAL AND ELEMENTARY

Abridgment of the Common Law

AS ALTERED AND ESTABLISHED

BY THE

RECENT STATUTES, RULES OF COURT,

AND

MODERN DECISIONS;

COMPRISING A

FULL ABSTRACT OF ALL THE CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Law, & on Appeal.

WITH

THE RULES OF COURT, FROM M. T. 1824, TO M. T. 1840, INCLUSIVE,

AND

THE STATUTES DURING THE SAME PERIOD.

WITH

CONNECTING AND ILLUSTRATIVE REFERENCES TO THE EARLIER AUTHORITIES AND EXPLANATORY NOTES.

By CHARLES PETERSDORFF, Esq.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. IV.

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A

PRACTICAL ABRIDGMENT

OF THE

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE COURTS OF

Queen's Bench, Common Pleas, & Exchequer,

FROM

MICH. TERM, 4 GEO. 4, TO MICH. TERM. 3 VICT.,

AND OF

THE RULES OF COURT, STATUTES, &c. &c. &c.

Executors and Administrators.

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IV. RELATIVE TO THE FUNERAL‡ EXPENSES AND MOURNING§.

EDWARDS *v.* EDWARDS, E. T. 1834. Ex. 2 *C. & M.* 612; S. C. 4 *Tyrw.* 38.

The sum for funeral expenses depends on circumstances.

IN an action against an executor upon the plea of plene administravit the executor claimed to be allowed the sum of 103*l.* for funeral expenses.

The Court held, that even reasonable expenses must vary with the circumstances of each case, beyond which the executor will be responsible, if the estate should turn out to be insolvent.

HANCOCK *v.* PODMORE, T. T. 1830. K. B. 1 *B. & Ad.* 260.

£79 is too large a sum, as against creditors, for a captain in the army.

THIS was an action against the defendant as executrix. The plaintiff having made out a primâ facie case by proof of the probate, which was stamped to cover a sum above 2,000*l.* and under 3,000*l.*, the defendant proved, that, on the death of the testator, who had been a captain in the army, and who was on half pay at the time of

* In general all persons having legal capacity may be executors.

† An executor may in all cases renounce the office, unless he has intermeddled with the estate of the deceased. (*Wangford* v. *Wangford*, M. T. 1704, K. B., Freem. Rep. 520; S. C. 1 Salk. 299; 11 Mod. 38). If an executor refuse to act, his renunciation is entered and recorded in the Spiritual Court before the ordinary. A mere verbal declaration of unwillingness to act is not sufficient; but to give it validity, it must be thus solemnly entered and recorded, and then administration, with the will annexed, will be granted to another. (Toll. Ex. 42). If an executor act before probate, he cannot renounce so as to discharge himself from the liabilities attached to it. (*Rogers* v. *Frank*, E. T. 1827, Ex. Equity, 1 Y. & J. 409).

‡ The widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licenses of the house as a security for the payment of his bill. A., one of the firm of the distillers who supplied the house with spirits, by arrangement with the widow took out administration; B., the other partner in the firm, promised the undertaker, that, if he would give up the licenses to him, he would pay his bill for the funeral:—Held, that the undertaker, having given up the licenses to B., might recover his bill against B., although the widow was his original employer, and although he had made out his account charging the administrator as his debtor. (*Walker* v. *Taylor*, M. T. 1834, N. P., 6 C. & P. 752).

§ A demand for mourning furnished to the widow and family of a deceased person is not a "funeral expense," and cannot be claimed against the estate by the executor if he gives the order; and, by consequence, a legatee, who has not received his legacy, is a competent witness, on the part of the executor, in an action brought against him for the recovery of such demand. (*Johnson* v. *Baker*, M. T. 1825, N. P., 2 C. & P. 207).

his death in 1825, the property which belonged to him, and which came into the hands of the defendant as executrix, amounted only to 129*l.*, and that she had paid 79*l.* for funeral expenses, and 59*l.* for probate duty.

Per Cur.—We all think that 79*l.* was too large a sum to be allowed in the present case. The rule as against a creditor is, that no more shall be allowed for a funeral than is necessary; for, considering what is necessary, regard must undoubtedly be had to the degree and condition in life of the party. We think, under the circumstances, 20*l.* would be sufficient.

See Stay v. *Pawler*, 3 *Atk.* 119.

REEVES *v.* WARD, M. T. 1838. C. P. 2 *Bing. N. S.* 235; S. C. 2 *Scott*, 390.

£10 is the proper sum for a small tradesman.

THE deceased was a small tradesman. On the question as to the funeral expenses—

The Court held 10*l.* to be a reasonable allowance to the executrix for funeral expenses as against a creditor.

BRICE *v.* WILSON, E. T. 1834. K. B. 3 *N. & M.* 512.

But an executor who promises to pay funeral expenses is liable though the widow gave the order.

THE executor, in an action against him for funeral expenses, suffered judgment by default—

The Court held, that although he had not ordered them, but the widow to whom the credit was in fact given, yet having made no objection, and expressly promised payment of the bill, he had adopted the acts of the widow and constituted her his agent, and that he was liable upon the ground of having rendered himself expressly liable: upon his common law liability, he would only have been liable to the extent of the expenses of a reasonable funeral for a person in the situation of the deceased.

LUCY *v.* WALROND, M. T. 1837. C. P. 3 *Bing. N. S.* 841.

Whether an administrator, who approves of a funeral ordered by a third person, is liable, is a question for the jury.

THE defendant, who eventually took out letters of administration to his mother, being abroad at the time of her death, expressed himself, in a letter to the person ordering the funeral, satisfied with what had been done.

The Court held the question to have been properly left to the jury to say, whether he had not ratified the order and was liable to the amount.

ROGERS *v.* PRICE, H. T. 1829. Ex. 3 *Y. & J.* 28.

He is liable, when he has assets, for suitable funeral expenses, though ordered by a third party.

THE testator died in Wales, at the house of his brother, who thereupon sent for the plaintiff, an undertaker, residing at a distance. The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner. It was admitted that the funeral was suitable to the degree of the deceased. Upon these facts, there being no evidence of any contract made by the defendant, or that he knew of the funeral until after it had taken place, the learned Judge was of opinion that the plaintiff was not entitled to recover, and directed a nonsuit, with leave to enter a verdict for the plaintiff.

The Court held, that an executor who has assets sufficient for

that purpose, is liable upon an implied promise to pay for a funeral suitable to the degree of his testator, furnished by the directions of a third person.

See Tugwell v. *Heyman*, 3 *Campb.* 298.

V. RELATIVE TO WHAT ARE ASSETS AND WHAT IS AN ADMISSION OF ASSETS*.

BRITTON *v.* JONES, T. T. 1837. C. P. 3 *Bing.* 676; S. C. 4 *Scott*, 393.

Furniture recently purchased by testator before his death is primâ facie evidence of assets.

IN an action against an executor, issue was taken upon a plea of no assets and plene administravit, and replication of assets in hand. The evidence was, that the testator twelve months before his death purchased twelve chairs, which were seen in his house shortly before his death.

The Court held that circumstance, in the absence of any proof that the goods were lost, primâ facie evidence of assets.

FOSTER *v.* BLAKELOCK, E. T. 1826. K. B. 5 *B. & C.* 328; S. C. 8 *D. & R.* 48.

Proof of the amount of the stamp upon the probate is presumptive evidence of assets to that amount.

ASSUMPSIT for work and labour performed by the plaintiff, as a sheriff's officer, for the defendant's testator, who was an attorney, in making arrests of divers persons at his instance and request, in conveying divers of those persons to prison, and also for poundage due in respect of divers captions and levies upon writs of execution. The defendant pleaded plene administravit. To meet the plea of plene administravit the plaintiff proved the amount of duty paid by the defendant in obtaining the probate, and this *Cross*, Serjt., who tried the cause, held to be good primâ facie evidence that the defendant had funds equal to the sum, which would be covered by the next lower stage of duty. On motion for a new trial—

The Court were of opinion, that the amount of the probate duty paid by the defendant as executor was presumptive evidence to go to the jury, so that they might form some opinion as to the amount of the goods received by the executor. It was not unreasonable to suppose, after a reasonable distance of time, that an amount equal to the next lower degree of duty had been received, especially if the executor did not, as he did not in this instance, shew that he had made any payments to reduce the fund.—Rule refused.

MANN *v.* LANG, T. T. 1835. K. B. 5 *N. & M.* 202.

Probate stamp admissible, though not per se even primâ facie evidence of assets come to the executor's hands, but as a declar-

DEBT for goods sold and delivered, and the money counts. Pleas, set-off, plene administravit præter 200*l.*; and by one of the executors, plene administravit præter 200*l.*, and a debt which he retains. Issue taken and joined upon the respective pleas, except an admission to a certain amount on the plea of set-off. The plaintiff having given evidence of the value of the goods which came to the hands of

* In an action against the husband as administrator of his wife, for a debt due from her dum sola:—Held, that her admissions during the coverture were admissible as to assets; the defendant's character of husband having nothing to do with the action against the representative of the wife, whom she might bind. (*Humphreys* v. *Boyce*, 2 M. & M. 140).

ation of what he expects will come to his hands.

the defendants, also gave evidence of the stamp duty on the probate, which was 22*l.*, and would cover property to the amount of between 800*l.* and 1000*l.* This evidence was objected to on the part of the defendants on the authority of *Stearn* v. *Mills*, (1 N. & M. 436), as being no evidence on the issue. *Coleridge*, J., admitted the evidence. A rule had been obtained calling on the plaintiff to shew cause why the verdict should not be set aside.

Lord *Denman*, C. J.—This rule was moved for on the ground, that, on the issue taken on the plea of plene administravit, the stamp on the probate was improperly received in evidence; and the question is, whether this being put in amongst other evidence was admissible. Now, if it is to be considered on the principle of its being a declaration by the party, I must say that I think this evidence was admissible. It was admissible as confirmatory evidence to what extent the other evidence went to prove assets. It is very difficult to draw a line and say after what time the stamp upon the probate becomes evidence. Acquiescence by the executors is strong evidence that what they expected to receive had come to their hands, and the stamp upon the probate must be admissible as confirmatory of other evidence.

See 1 *C. & P.* 180; 5 *B. & C.* 398; 4 *B. & Ad.* 657; *S. C.* 1 *N. & M.* 436.

RIDDLE *v.* SUTTON, M. T. 1828. C. P. 5 *Bing.* 200; S. C. 2 *M. & P.* 345.

An executor submitting to reference as such admits assets.

BY an agreement between the plaintiff and the defendant as executrix, reciting, that disputes and differences had arisen and were depending between them respecting certain unsettled accounts, it was agreed that for the finally settling such disputes the said matters in dispute should be referred to the final award and determination of two arbitrators. There was no reservation by the executrix as to assets, and the arbitrators awarded that she should pay the plaintiff a certain sum. In an action of debt on the award—

The Court held, that a plea of plene administravit was no answer to the action.

SMEDLEY *v.* PHILPOT, T. T. 1836. Ex. 3 *M. & W.* 573.

A solicitor was to be paid his costs out of the first assets:—Held, that a sum being awarded out of the same suit in Chancery, was assets.

A PARTY employed successively the plaintiff and others as solicitors in a suit in Chancery; and eventually, after her death, upon revivor, the then attorney obtained a decree and an order for the Master to settle the costs of all parties, which, when settled, were to be paid as directed, viz. the costs of the plaintiffs to their then solicitor, and of the defendants to their several solicitors. The plaintiff, one of the original solicitors, having received a part, and a judgment of assets quando, which, on proceeding to enforce, the executor induced him to stay, undertaking to pay the residue of his bill out of the first assets. Upon a further sum being awarded out of Chancery in the suit in respect of the same costs:—Held, (*per Parke* and *Alderson*, BB., contra Lord *Abinger*, L. C. B.), that such sum was assets within the meaning of the undertaking.

GLAHOLM *v.* ROWNTREE, T. T. 1836. K. B. 6 *Ad. & E.* 710.

An executor had a policy

THE testator deposited with the party whom he made his executor a policy, as security for a debt and for a further advance, which the

office refused to pay, unless a receipt was given by the holder, "as executor," and which he did.

The Court held that, upon the plea of plene administravit, except &c., that the executors were only chargeable for the surplus as assets, after payment of the debt.

deposited with him as a security:—Held, that, after paying himself, the surplus was assets.

VI. RELATIVE TO TAKING OUT LETTERS OF ADMINISTRATION, AND OF THE PROBATE DUTY.

STOKES *v.* BATE, E. T. 1826. K. B. 5 *B. & C.* 491; S. C. 8 *D. & R.* 247.

ASSUMPSIT by an administratrix on a note to the intestate, alleging promises to the testator and to plaintiff, averring the grant of letters of administration by the Bishop of C. Plea, that plaintiff never had been nor was administratrix, &c., in manner and form as alleged; on which issue was joined. It was proved that the deceased had bona notabilia, in the diocese of L., in another province; but no evidence was given as to the defendant's residence in the diocese of C. at the time of the intestate's death.

Where a party has bona notabilia in two dioceses within the same province, either diocesan has power to grant administration; and when in different provinces, the administrations of the respective dioceses are not void, but limited in operation.

The Court held, 1st, that where an intestate has bona notabilia in two dioceses within the same province, either diocesan has power to grant administration; but where there are bona notabilia in dioceses in different provinces, the administration of the respective diocesans is not void, but would operate on any debt, where the debtor, at the time of the intestate's death, lived in such diocese; and 2ndly, that the plea only put in issue whether the plaintiff was such administratrix, as she had alleged herself to be, and not whether of any particular debt. If the defendant meant to have contended or shewn that the letters were void, by some matter dehors them, or that they were not applicable to the subject-matter in the suit, he should have stated upon his plea the *specific* circumstance rendering them void, or which prevented the plaintiff from being entitled to sue.

SEWERCROP *v.* DAY, T. T. 1838. Q. B. 3 *N. & P.* 670.

THE declaration stated that the plaintiff administered, with the will annexed of Hubert Fox, deceased. It appeared that the defendants had been indebted to the testator, Hubert Fox, who died in the West Indies in May 1830, having appointed Owen Kernan, who was also abroad, his executor. He did not prove the will personally; but administration was granted to Allan Macdonald, with the will annexed, for the benefit of Owen Kernan, in December, 1830. In August, 1831, Kernan died, having appointed John M'Dowell and J. H. Hewlings his executors. M'Dowell afterwards died; and administration, with the will annexed of H. Fox, was granted to the plaintiff, until Hewlings should prove the will of Kernan. On the 28th of November, 1833, Macdonald was alive, when the action was commenced.

Where letters are granted, with will annexed, on account of absence of executor abroad, on his death administration de bonis non is good.

Per Cur.—The question in the cause is, what is the legal effect of these different letters of administration? We are of opinion that, by the first grant, Macdonald became the legal representative of Fox during the life of Kernan, and, at all events, until he should himself

take out probate, which he never did; but that, on the death of Kernan, that grant was ipso facto at an end, and the subsequent grant to the plaintiff is good.

ATTORNEY-GENERAL *v.* STAFF, M. T. 1833. Ex. 2 *C. & M.* 124; S. C. 4 *Tyrw.* 14.

On the exercise of a power under a will, the probate duty may attach.

A TESTATOR bequeathed certain stock to trustees, subject to a power to be executed by deed or will, with or without power of revocation; and in default of appointment, to pay the dividends to the donee during her life, and at her decease to divide the principal amongst her children. After the death of the testator the donee executed a deed according to the mode prescribed by the will, wherein, after reciting that she was desirous of executing the power, she directed the fund to be transferred to herself, and a new trustee appointed, with similar trusts, powers, and limitations, as were contained in the will; in pursuance of which deed, the funds were transferred into the names of the donee and the new trustee. The donee afterwards, by will, "by virtue and in exercise and execution of the power and authority given and reserved to her in and by the said indenture, and of all and every other power," &c., appointed the fund to be transferred to certain persons, "in trust that the same might be consolidated with and become part of her residuary estate, and follow the dispositions thereof thereinafter contained."

The Court held, that the deed executed by the donee was an exercise of the power under the original will, and that the fund thereby became her personal estate, in which she had a beneficial interest, and consequently was liable to the payment of probate duty.

ATTORNEY-GENERAL *v.* BOUWENS, T. T. 1838. Ex. 4 *M. & W.* 771.

Bonds of foreign states, transferable by delivery, without any act to be done in this country, are included in probate duty;

A TESTATRIX, at the time of her death, had property within the province of Canterbury, consisting of certain written instruments called Russian, Danish, and Dutch bonds, which, by a special verdict, were found to be marketable securities within this kingdom, transferred by delivery only, and that it never had been nor is necessary to do any act whatsoever out of the kingdom of England in order to make the transfer of any of the said bonds valid. The verdict also found, that all the bonds came to the possession of the executors as part of the personal estate of the testatrix, and were sold and delivered by them for 7000*l.* and upwards, without doing any act out of the jurisdiction of the Prerogative Court.

The Court held, that probate duty was payable in respect of this property.

ATTORNEY-GENERAL *v.* HOPE, M. T. 1834. Dom. Proc. 1 *C., M. & R.* 530.

but the duty is not payable on personal estate abroad*.

IN this case the Court held, that probate duty is not payable under 55 Geo. 3, c. 184, in respect of personal assets of an Englishman domiciled and dying in England, which, being locally situate in a foreign country at the time of his death, were not brought

* On proving a will, the executor need not, in the amount for which probate duty is paid, include debts due to the testator which are either desperate or

hither till after that event by his executors, though they had obtained an English probate in respect of his personalty situate in England, and proceeded, by virtue of that probate, to collect and administer in this country the whole of the assets.

VII. RELATIVE TO THE RIGHTS OF EXECUTORS AND ADMINISTRATORS*.

Doe *v.* Tatchell, T. T. 1832. K. B. 3 *B. & Ad.* 675.

Where there is a devise of a term in trust to an executor, the election as to the character in which he takes may be implied from circumstances.

An executor was also devisee of a term in trust, to apply the proceeds to the maintenance of the testator's son B., of weak intellect, for life, remainder to such uses as the son should by will appoint. Upon the death of the testator the executor said that the house was B.'s, but that T., a journeyman, must stay in the house and carry on the business as before, but young B. must have a hiding place; the journeyman accordingly remained in the house, carried on the business, paid no rent, but took care of the son, and the executor lived for twenty years afterwards, but never interfered further with the property.

The Court held, that it was sufficient evidence of his consent to take as devisee in trust, and not that he acted as executor.

Whitaker *v.* Tatham, M. T. 1330. C. P. 7 *Bing.* 628; S. C. 5 *M. & P.* 628.

A specific bequest to an executor for care and trouble excludes him from residue.

The testator gave certain real and personal estate to the defendants, whom he had named his executors and trustees, upon trust to pay his just debts and funeral expenses, and to pay to his executors (viz. themselves) 20*l.* each for their care and trouble.

The Court held a bequest to executors, for the care and trouble they might have in the execution of the testator's will, renders the executors only trustees of, and not beneficially interested in, the residue undisposed of by the will.

See 1 *Vern.* 473; 2 *A. & B.* 294.

Freakley *v.* Fox, H. T. 1829. K. B. 9 *B. & C.* 130.

Where the holder of a note appointed the maker his executor, it was held to be extinct.

This was an action by the indorsee against the maker of a promissory note. The note was payable to one Robert Reeves, or order. Reeves died, appointing several persons, and among them the defendant, his executors. The other executors indorsed the note to the plaintiff, who thereupon, as indorsee, sued the defendant; and

doubtful; and the executor has a right to exercise his judgment fairly and bonâ fide, whether a debt is doubtful or bad. (*Moses* v. *Crafter*, H. T. 1831, N. P., 4 C. & P. 524).

* By the 1 Will. 4, c. 40, s. 1, "Where any person shall die after 1st September, 1830, having by his will, or any codicil thereto, appointed executors, such executors shall be deemed by courts of equity to be trustees for the persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, that the executors were intended to take such residue beneficially."

By s. 2, it is not to affect the rights of executors where there is not any person entitled to the residue by the Statute of Distributions.

the question was, whether, by this mode of dealing with the note, the defendant, although he was executor of the payee, could be forced at law to pay the amount.

Per Cur.—The defendant contended that the effect of his being made executor was the extinguishment of the note as a debt at law, and that an indorsement, even by himself, would be of no avail; and we are of that opinion. The cases are all collected in the case of *Cheetham* v. *Ward*, (1 B. & P. 630), which was cited in the argument. We have looked into the earlier authorities, particularly that in the 21 Edward the 4th, 81 b., which was recognized in the case of *Wankford* v. *Wankford*, (1 Salk. 300), and we find it to be laid down clearly and unqualifiedly that the debt is gone for ever by the appointment of the debtor to be executor to the creditor. It is considered as if the debt had been paid; because it must be known to the testator that the executor cannot sue himself. The judgment must therefore be for the defendant.

PALMER *v.* COHEN, M. T. 1831. K. B. 2 *B. & Ad.* 966.

Where the testator has obtained a verdict in an action for a libel, the executor may enter up judgment.

IN an action for a libel, the testator recovered a verdict in his lifetime for damages, and before judgment died. On motion by his executor for leave to enter up judgment under the 17 Car. 2, c. 8, s. 1—

The Court held that the executor was entitled to do so.

VIII. RELATIVE TO THE LIABILITIES OF EXECUTORS AND ADMINISTRATORS.

DAVIS *v.* BLACKWELL, H. T. 1831. C. P. 9 *Bing.* 5; S. C. 2 *M. & Scott*, 7.

If an executor pays over the residue before the six months, he is personally liable for breaches of covenant committed by the testator*.

IN an action of covenant against an executor for breaches of covenant by his testator, it appeared that the defendant, the executor, had paid over the residue to the residuary legatee within six months.

The Court held the executor personally responsible for breaches of covenant in the time of his testator; and he cannot plead such payment before notice of the covenant, or breach of it; nor need the plaintiff reply a devastavit to the plea plene administravit.

GOODCHILD *v.* FENTON, M. T. 1829. Ex. 3 *Y. & J.* 481.

And an executor who receives dividends, and does not invest them, will be charged with interest.

UNDER a bequest of stock to A. for life, and after the decease of A. to the testator's great grandchildren share and share alike, if they were living at the time of A.'s death, but that they should not receive any part of the capital till they arrived at twenty-one. But if any one or all of the said children should die before they arrived at the age of twenty-one years, the shares or part of those so dying should go to B. and C. share and share alike.

* A prompt offer by an executor to surrender a lease is an answer to an action for subsequent breach of covenant. (*Reed* v. *Lord Tenterden*, E. T. 1833, Ex., 4 Tyrw. 111).

The Court held, that the executor was chargeable with interest on dividends of stock received by him, and kept at his banker's with his own money for a number of years, instead of being invested to accumulate.

STEARN *v.* MILLS, E. T. 1833. K. B. 1 *N. & M.* 436.

TWO executors had jointly handed in an inventory to the ordinary, but it was proved that one of them had never interfered with the testator's effects, and personally had received no assets. Upon plene administravit—

One of several only liable to amount of assets actually received by him.

The Court held he was entitled to a verdict. The inventory of the goods and chattels of the deceased, made out by the executor for the purpose of taking out probate of the testator, is not conclusive evidence of assets in the hands of the executor to the amount specified in that inventory.

SAMMON, *in re*, T. T. 1837. Ex. 3 *M. & W.* 381.

ON application, under the 42 Geo. 3, c. 55, by the commissioners of stamps for an account of duties payable, if any, it was opposed on the ground that a suit was pending for the administration of the estate by a legatee.

An application for an account* of duties is not answered by a suit pending for administration of the estate.

The Court held, that the pendency of a suit for administration of the estate by a legatee was no answer.

IX. RELATIVE TO A DEVASTAVIT†.

PENNINGTON *v.* HEALEY, H. T. 1833. Ex. 1 *C. & M.* 402.

AN administrator having recovered a verdict for 750*l.* after the debtor had remained in prison a considerable time, and petitioned the Insolvent Court for his discharge, received, by way of compromise, the sum of 150*l.*, and consented to the debtor's liberation.

An executor may make a fair and reasonable compromise without being guilty of a devastavit.

The Court held—first, in an action by a creditor of the intestate, and evidence that the costs of the former suit exceeded 150*l.*, that the proper question was, whether the compromise was fair and reasonable, and that a verdict for the defendant was right; and, secondly, that an executor or administrator, who has obtained a verdict for a debt of his testator or intestate, may make a fair and reasonable

* A rule to shew cause granted, on 42 Geo. 3, c. 99, s. 2, calling on an executor to account to the commissioners of stamps for the testator's personalty. That rule was served on the executor; but, after repeated attempts to serve him with the rule absolute, the service could not be effected. The Court, on a very strong affidavit of the facts, granted a rule nisi for an attachment, unless cause was shewn in eight days, directing that rule to be served personally. (*In re Barwick*, 5 Tyr. 431; 3 Dowl. P. C. 703). Where a motion is made against an executor to compel him to account, and the rule is made absolute, it is not imperative upon the Court to make the rule absolute with costs. (*Ex parte Siratt*, 3 Dowl. P. C. 209).

† Quære, whether the service of a writ of summons under 2 Will. 4, c. 39, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him in that character, so as to render him liable to a devastavit, if he pay debts of an equal degree with that sued for between the service of the writ of summons and the filing the declaration. (*Rees v. Morgan*, H. T. 1834, K. B., 3 Nev. & M. 205; S. C. 5 B. & Adol. 1035).

compromise to discharge the debtor out of custody, without rendering himself liable for the amount of the verdict as assets.

PALMER *v.* WALLER, T. T. 1836. Ex. 5 *D. P. C.* 172; S. C. 1 *M. & W.* 689; S. C. 1 *T. & G.* 1014.

If the executor does not plead plene administravit, other pleas are evidence of a devastavit.

THIS was an action against the defendant, as executor of one ——, on a promissory note made by the testator, to which the defendant pleaded—first, that the testator did not make the note; secondly, that it was in part merely an accommodation note; and, thirdly, that the residue had been paid. Issue was joined on all these pleas, and the plaintiff recovered a verdict on all. Judgment was signed against the defendant, and a writ of fi. fa. was sued out directed to the sheriff of Norwich to levy on the goods of the testator. To that writ the sheriff returned nulla bona, and the plaintiff sued out a scire fieri inquisition, directing him to inquire whether there had been a devastavit. An inquisition was held before the undersheriff of Norwich, when the plaintiff put in a copy of the judgment-roll and the sheriff's return of nulla bona, and contended that this was sufficient evidence of a devastavit against the defendant. The undersheriff thought not; and, under his direction, the jury returned that the defendant had not been guilty of any devastavit. On a rule calling upon the defendant to shew cause why this inquisition should not be set aside—

The Court made the rule absolute, *Alderson*, B., observing that the record proved that the defendant had had assets, and he had not accounted for the disposition of them; he should have pleaded plene administravit.—Rule absolute.

LEONARD *v.* SIMPSON, T. T. 1834. C. P. 2 *Bing. N. S.* 176; S. C. 2 *Scott*, 335.

The production of a testatum fi. fa. and sheriff's return, &c. is sufficient notice of a claim.

BY judgment by default in a former action the executor had admitted assets.

The Court held, that, in debt upon the judgment, the production of the testatum fi. fa. and sheriff's return of nulla bona testatoris, and levy of costs de bonis propriis, was sufficient evidence of notice of the claim and of a devastavit.

X. RELATIVE TO THE REMEDIES.

(*a*) ACTIONS BY.

1. *When maintainable.*

COLES *v.* BANK OF ENGLAND, E. T. 1839. Q. B. 2 *P. & D.* 521.

An executor cannot maintain an action which could not have been sustainable by the testator on account of the latter's negligence*.

IN an action on the case against the Bank of England for not transferring stock of a testatrix to the plaintiff, the executor, (and pleas, 1st, not guilty, and 2nd, that the deceased was not possessed of the stock), it appeared that the testatrix, a very aged person, had up to a late period with her nephew, a clerk in the Bank, always received the dividends, but that she had been personated at the transfer office by a female taken by the nephew, and who forged the

* An executor has a right of action against the Bank for not permitting the transfer of stock by him, although such stock may have been specifically be-

signature of the testatrix to several portions of the stock; the jury having found that the testatrix had the means of knowing that the transfer had been made, although she did not appear to have actually known thereof, and was guilty of gross negligence in leading the defendants to believe that she sanctioned those transfers, and that there was no negligence in the Bank in transferring without ascertaining the identity of the testatrix—

The Court held, that the facts constituted an answer to the action.

BETTS *v.* KIMPTON, E. T. 1831, K. B. 2 *B. & Ad.* 273.

If the husband dies without taking out administration to his wife of choses in action, his administrator cannot sue without taking out administration to the wife.

IN this case the question was, whether, if the husband and wife die, and the husband has not reduced the wife's choses in action into possession during her life, his administrator will be entitled after his death to sue for them in a court of law until he has taken out administration to the wife?

Lord *Tenterden*, C. J.—The question here is, not who is entitled to the money, but who is entitled to sue. If you bear this distinction in mind you will reconcile all the cases. In *Squib* v. *Wyn*, administration to both the husband who survived his wife, and de bonis non of that wife, had been taken out by the party holden entitled, and at the end of the report in P. Williams, 382, the case of *East* v. *Rees*, (Id. 378), is referred to. Mr. *Vernon* is said to have there cited this case of *Squib* v. *Wyn*, shewing that Lord *Cowper's* opinion was the same with Lord *Parker's*, viz., "That the wife's choses in action did vest in the husband by the Statute of Distributions, so that since this resolution the right of administration follows the right to the estate, and ought in this case of the husband's death after the wife to be granted to the next of kin of the husband, in the same manner as it is granted to a residuary legatee." Yes: but what! is the administration to be granted to the representative of the husband? Why, administration to the wife?

GLEADOW *v.* ATKIN, T. T. 1832, Ex. 2 *Tyrw.* 593; S. C. 2 *C. & J.* 548.

If one executor lends part of assets to another, the former may sue on the securities given for the payment of the loan.

A PLEA to a declaration by the executors of one joint executor against the executors of the other, on a bond by the latter original executor to the former, that the money for which the bond was given was the personal estate of the original testator, directed by his will to be laid out "on real or other sufficient securities as they should approve"—

The Court held the plea bad on special demurrer. The lending of money, directed to be laid out on real or other sufficient security as the executors should approve, by one executor to the other on bond, is a misapplication for which the executors of the former are liable under stat. 4 & 5 W. & M. c. 24.

queathed. (*Franklin* v. *The Bank of England*, 9 B. & C. 156; abridged, ante, Vol. 1). An executor may, after refusal, maintain trover for papers, &c., in the hands of a third person, though delivered to the latter with express directions not to deliver them up without having a receipt from the executor for them. (*Cobbett* v. *Clutton*, 1826, N. P., 2 C. & P. 471).

2. *Parties to.*

PLACE *v.* DELEGAL, T. T. 1837. C. P. 4 *Bing. N. S.* 426.

Where a guarantie was given to executors and their attorney:—Held, that the executors might sue alone.

A LEGATEE assigned his interest in the share of premises devised to be sold, and the assignee gave a guarantee to the plaintiffs, the executors, and also to their attorney, who managed the sale and paid over the money, the legatee being bankrupt, and the share claimed by his assignees.

The Court held, that the action upon the guarantie might be properly brought by the executors without joining the attorney, they having a separate interest.

BRASSINGTON *v.* AULT, T. T. 1824. C. P. 2 *Bing.* 177; S. C. 9 *Moore,* 340; S. C. 1 *C. & P.* 302.

So, where one of several executors after the testator's death employ a defendant, he may sue alone as in his own right.

THREE executors ordered goods to be sold as the goods of their testator. They afterwards sued for the amount without styling themselves executors, and without joining a fourth executor who was named in the will.

Per Cur.—In an action by executors, all the executors ought to be joined, because the law has been so from the earliest time; and it has been laid down that even an infant executor must be named. But, in the present case, the order to sell was given by three persons; nothing passed to shew that they were acting in a representative character, and those three persons having sued on their contract, the defendant could not have set off any debt from the testator to him. The decision of the King's Bench, therefore, which has been cited, does not apply, for in that case the parties *expressly* sued as executors. *Webster* v. *Spencer,* (2 B. & Ald. 360).

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3. *Declaration.*

HUGHES *v.* WILLIAMS, T. T. 1835. Ex. 2 *C., M. & R.* 331; S. C. 4 *D. P. C.* 169.

Declarations by administrators must shew grant of letters by competent authority*.

IN a declaration by an administratrix, profert was made of letters of administration, duly granted by the Consistory Court of St. Asaph, but no date was mentioned. On special demurrer—

The Court held that the omission of the date was immaterial; but that, as there was no averment that the Consistory Court was empowered to grant letters of administration, the declaration, therefore, was bad.

MARSHALL *v.* BROADHURST, E. T. 1831. Ex. 1 *C. & J.* 403; S. C. 1 *Tyrw.* 348.

If the contract be personal to the testator himself the executors must declare as such; aliter, if part of

A. AGREED to do certain work, and died before the work was begun. The executors of A. did the work, using the materials of A. In an action by the executors, in their representative character, for work and labour done, and materials found—

Per Cur.—If a party contract for himself and his executors to build a house and die, the executors must go on, as they would be

* The title of three claiming as executors is well evidenced by the probate granted to one only, the will appointing them all. (*Walters* v. *Pfeil,* T. T. 1829, N. P., 1 M. & M. 362).

liable to damages for not completing the work; if they go on, it is work and labour done by them as executors; they may recover as executors, and the money, when recovered, will be assets in their hands. Suppose a party to have engaged to build a house, and to have procured all the necessary materials, in the event of his death may not the executors complete the work, or must they dispose of the materials at a loss to the estate? Or, if a man build half a house, and die, if the executors complete the work, are there to be two actions in respect of the same job? Such a rule would, in many cases, operate much to the deterioration of property. It is otherwise where the testator enters into a personal engagement, to be performed by himself only. In the absence of authority to the contrary, it seems reasonable that the plaintiffs should recover under the circumstances of this case.

the work be done by the executors.

M'Lachlan *v.* Evans, E. T. 1837. Ex. 1 *Y. & J.* 380.

In indebitatus by an administratrix to recover the amount of foreign securities, delivered into the defendant's hands by the intestate a few days before his death, all the counts of the declaration alleging the consideration to have arisen in the lifetime of the intestate, and the facts precluding the supposition that the securities had been converted into money in his lifetime—

The Court held, that the foundation of the action—namely, the receipt of money, failed, and a nonsuit was therefore right.

Under a declaration that the cause of action accrued in the deceased's lifetime, facts after the death cannot be shewn;

Edwards *v.* Grace, M. T. 1836. Ex. 5 *D. P. C.* 302; S. C. 2 *M. & W.*

Assumpsit for work and labour, goods sold, &c., alleging promises to pay the intestate. There was also a count for work done by the plaintiff, as administrator, and alleging the promises to the plaintiff, as administrator. Special demurrer, and joinder thereon.

Per Cur.—If there be any case in which an administrator is bound to go on with the contract of his intestate, the counts may be joined. *Marshall* v. *Broadhurst*, (ante, page 14), shews that there may be such a case; and how do we know but that this work was done by workmen paid out of the intestate's estate?

but the declaration may contain counts for work done by the intestate and the plaintiff, as administrator;

Aspinall *v.* Wake, T. T. 1833. C. P. 10 *Bing.* 51; S. C. 3 *M. & Scott*, 423.

Testator had dealings, in the ordinary course of business, with the defendants, and there were accounts current between them. Upon his death the executors continued the dealings, and the defendants accepted bills drawn upon them by the plaintiffs as executors. In an action brought by the plaintiffs to recover a balance, the declaration consisted of two sets of counts: the first alleged that defendants were indebted to testator for goods sold and delivered by him to them at their request; the second, that the defendants, after the death of the testator, were indebted to the plaintiffs as executors. Verdict for plaintiffs upon the second set of counts. Upon motion and rule nisi to set aside verdict, and have it entered for defendants, upon the grounds of misjoinder and variance between the proof and the allegation—

The Court held, first, that as the jury found a verdict on the one

and executors selling goods after the death may sue for them in an action containing counts on promises to testator.

set of counts alone, the declaration was to be considered as consisting of that set only, consequently the objection arising from misjoinder was at an end; second, that there was no variance, as the defendants, by accepting bills drawn by plaintiffs as executors, had recognized them in their representative capacity. At all events, under the circumstances of the case, the description as executors was immaterial, and might be rejected as surplusage.

See Cowell v. *Watts*, 6 *East*, 405.

KENNEDY *v.* WITHERS, T. T. 1832. K. B. 3 *B. & Ad.* 467.

Under a count upon an account stated with plaintiff, as executor, he cannot give in evidence more than one accounting.

THIS was an action of assumpsit for use and occupation, and on an account stated with the plaintiffs, as surviving executors. Upon that count 4*l.* was paid into Court, and there was a set-off as to another part of the demand.

Per Cur.—The defendant, by paying 4*l.* into Court on the account stated, admits that there has been an accounting, upon which he was found indebted in that amount. But the cause of action is not admitted by him, only the account and the result. By the form of the count, the plaintiffs cannot give evidence of more than one accounting. It is not like a count for goods sold, which may have been at several different times.

BUXTON *v.* NANCOLAS, T. T. 1829. C. P. 11 *Moore*, 552.

If a declaration by an executor use the word "testator" unnecessarily, it may be struck out as surplusage.

THE declaration by executors in one count alleged, that the defendant was indebted to the deceased B. B. in his lifetime, and being so indebted, "he the said B. B." promised the said B. B., &c. Upon demurrer for repugnancy—

The Court held, that the words "the said B. B.," might be struck out as superfluous and unnecessary.

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4. *Oyer.*

DALEY *v.* MAHON, H. T. 1838. C. P. 6 *D. P. C.* 395; S. C. 4 *Bing. N. S.* 235.

If oyer be craved of the letters testamentary, with the will annexed, the will must be set out.

THE plaintiff having declared as executor, and made profert of the letters testamentary, the defendant demanded oyer, and the demand not having been complied with, took out a summons to compel oyer of the letters testamentary. Before the summons was heard, the plaintiff's attorney delivered a copy of the certificate of the Bishop of Armagh, which, it was contended before the learned Judge who heard the summons, did not amount to oyer of the letters testamentary; no order was made; and the plaintiff, on the same day that the summons was heard, signed judgment for want of a plea.

The Court held, that a demand of oyer of letters testamentary is not satisfied by the delivery of a copy of the Archbishop's certificate that the will has been duly proved, &c., without a copy of the will annexed.

5. *Pleas*.*

MITCHELL *v.* MOORMAN, M. T. 1826. Ex. 1 *Y. & J.* 21.

Plea of payment to, when no bar.

IN an action of debt on bond, it appeared that A. died intestate. B., the next of kin, having died without administering to the effects of A., C., executor of B., took out administration to A., the grant being of the goods, &c., "left unadministered" by B.

The Court held, that a payment to B. was no bar to an action by C., *Graham*, B., dubitante.

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6. *Verdict†.*

7. *Discontinuance‡.*

(*b*) ACTIONS AGAINST.

1. *When maintainable.*

JONES *v.* TANNER, M. T. 1827. K. B. 7 *B. & C.* 542; S. C. 1 *M. & Ry.* 420.

A party can only sue an executor for that which the testator might have been sued for.

IN an action of assumpsit, it appeared that the defendant's testator died, having in his lifetime possessed himself of his and the plaintiff's distributive property as administrator, and upon an application to the defendant for the plaintiff's share, according to an account produced, the defendant said it was right, and should be paid.

The Court held—first, that assumpsit would not lie against the defendant as executor for such share, it not being a debt for which his testator could himself have been sued at law; and, secondly, that there was no sufficient consideration for the defendant's promise to sustain the action.

RICHARDS *v.* BROWNE, H. T. 1837. C. P. 3 *Bing. N. S.* 493; S. C. 4 *Scott*, 262.

No statement can waive the right of suing a party in his representative character.

THE maker of a promissory note for 100*l.*, dated in 1815, continued to pay interest thereon until his death in 1825. He bequeathed certain furniture to W., his sister and executrix, for her life, with remainder to C. W. also paid interest on the note; and

* On a plea, by several executors, that they have fully administered, if some are shewn to have assets in their hands, and the others not, the latter are entitled to a verdict. (*Parsons* v. *Hancock*, 1829, N. P., 1 M. & M. 330).

† In assumpsit against several defendants as executors, with plea of ne unques executor, the plaintiff may have a verdict against the real executor, on the counts laying the promises by the testator, and the other defendants must be discharged. (*Griffiths* v. *Franklin*, M. T. 1828, N. P., 1 M. & M. 146).

‡ The application by an executor for leave to discontinue a suit is to the discretion of the Court: it therefore, under the circumstances, allowed the motion upon the terms of paying the costs of the count founded upon promises to the plaintiffs after the death of the testator. (*Blakeway* v. *Edwards*, 2 Y. & J., Ex., 559. And see *Harris* v. *Jones*, 3 Burr. 1451; *Melhuish* v. *Maunder*, 2 New R. 72).

in 1831 the attorney of the plaintiffs (the holders of the note) wrote to the defendant, the attorney for W., stating that payment was claimed of W., not as executrix, but individually; and a receipt for interest subsequently paid was afterwards given, wherein W. was not described as executrix. The defendant, as the executor of W., shortly after her death permitted C., the legatee in remainder, to take possession of the furniture, which was worth 200*l.*

The Court held that this was a devastavit, and that he was liable to pay the amount of the promissory note de bonis propriis; and the circumstances cannot vary his character as executor.

CASH *v.* COCK, E. T. 1833. Ex. 2 *D. P. C.* 3.

Where a judgment was set aside before administrator appointed, he was allowed to come in and defend.

JUDGMENT was set aside on payment of costs, which were tendered after the death of the defendant; but the plaintiff proceeded and set aside the rule before any administrator was appointed, and commenced a sci. fa. on the judgment.

The Court, on terms, permitted the administrator to come in and defend, and set aside all the proceedings subsequent to the declaration.

NATION *v.* TOZER, T. T. 1834. Ex. 1 *C., M. & R.* 172; S. C. 4 *Tyrw.* 561.

An action for use and occupation does not lie against an executor unless he occupies.

IN an action for use and occupation against two executors of a tenant from year to year, upon the question whether both were liable, upon the entry of one only—

The Court held, that the other never having occupied at all, he was not liable in that form of action; although, semble, he *might* have been liable for rent.

MEERT *v.* MOESSARD, H. T. 1828. C. P. 1 *M. & P.* 8.

If an administrator agrees to divide certain monies, the shares may be recovered under an account stated.

IN assumpsit, it appeared that the defendant, as administrator, had received monies for the purpose of being divided amongst the children of the intestate, of whom the plaintiff had married one. At the time of such receipt, it was agreed by all parties that the dividend then due should be paid to the plaintiff for the funeral expenses which had been disbursed by him.

The Court held, that the plaintiff was entitled to recover that sum even on the account stated.

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2. *Parties to.*

PEARSON *v.* PEARSON, M. T. 1833. K. B. 2 *N. & M.* 471; S. C. 5 *B. & Ad.* 859.

If, upon a sale by three executors, the price is to be paid to one, they may all join in the action.

IT was agreed by three executors that a certain sum, the value of goods to be purchased by the defendant, should be paid to one of them.

The Court held, that they might well join in an action for goods sold and delivered by the three; that the one to whom the money was to be paid was to be considered, as it were, merely the banker and agent of the rest.

3. *Declaration.*

ASHBY *v.* ASHBY, M. T. 1827. K. B. 7 *B. & C.* 444; S. C. 1 *M. & Ry.* 180.

An executor cannot be charged personally, and in his representative character, in the same declaration.

IN assumpsit against an executor and executrix, first, for money paid to the use of defendants as executors, &c.; second, for money had and received by defendants as executors, &c., to the use of plaintiff; and thirdly, for money due from defendants as executors, &c., upon an account stated with them as executors, &c. On demurrer—

The Court held the declaration bad for misjoinder, the Court doubting whether the first might not be good, but being clear that the second, charging the defendants personally, could not be joined with the third, which charged them as representatives merely.

CORNER *v.* SHAW, E. T. 1837. Ex. 3 *M. & W.* 350.

So, a count against an executor, for goods sold to him as such, cannot be joined with counts for money due from his testator.

IN an action of assumpsit against an executor for goods sold to his testator, and goods sold to him as executor, and for work, &c., performed for him at his request—

The Court held the declaration to be necessarily intended for debts due from him in his own right, and misjoined with counts for money paid to his use as executor, and on an account stated, and a promise by him as executor; and judgment arrested.

FOX *v.* WATERS, T. T. 1840. Q. B. 4 *P. & D.* 1.

In covenant against an executor for breach of a covenant for quiet enjoyment, against all having lawful title under him, the declaration must shew that the party claimed under the testator.

A DECLARATION in covenant against executors for a breach of covenant, for quiet enjoyment of an estate for life, against all having lawful title from the testator, alleged that the defendants, having lawful title, entered. The plea traversed, that the covenant of testator was broken during the continuance of the said term.

The Court held, that, although the plea was demurrable for making such general traverse, yet, as the declaration was also bad for not alleging that the defendants entered, having lawful title from the testator, it must be taken that the plaintiff had alleged a sufficient breach in his declaration, and that the averment of lawful title meant mesne title, derived from the testator; and that this being so, the plea put the title in issue.

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4. *Pleas.*

1.—*Plene administravit.*

WASNEY *v.* EARNSHAW, 1834. Ex. 4 *Tyrw.* 806.

Plene administravit is no answer if the executor has rendered himself personally liable.

DECLARATION against an executor. One count alleged the defendant to have been the executor of E., and to have assented to the legacy given by testator to the plaintiff, and that, upon an agreement, the defendant was allowed to retain it in his hands. Plea, plene administravit.

The Court held, that the plea of plene administravit could not be sustained by the contract, it becoming a loan to the executor for which he was personally liable.

SMITH *v.* DAY, T. T. 1837. Ex. 2 *M. & W.* 684.

And where the residue has been invested for the benefit of legatees, plene administravit cannot be pleaded to an action on a bond, though no notice given.

CERTAIN parts of the residue of the testator's estate remained in the hands of the executors, (after payment of all the debts of which they had notice), and they invested the same in the funds in their own names, and received the dividends, and paid them over to the legatees in satisfaction of their legacies under the will.

The Court held, that, under these circumstances, the executors could not support a plea of plene administraverunt to an action against them upon a specialty debt of the testator, of which they had no notice until fifteen years after testator's death.

MARSTON *v.* DOWNES, E. T. 1834. K. B. 1 *Ad. & E.* 31; S. C. 6 *C. & P.* 381.

Upon a plea of plene administravit, the plaintiff may shew that the payments were out of other assets.

TO an action against an executor—plea, plene administravit:—it being shewn that the payments proved on the part of the defendant had been made within a day or two of the day on which money had been raised by mortgage, it was left to the jury whether those payments had been made out of the money raised by the mortgage, or out of the assets proved, and that, if they believed them to have been made out of money raised by mortgage, they should find a verdict for the plaintiff. A verdict was found for the plaintiff. On a motion for a new trial—

The Court refused the rule.

REES *v.* MORGAN, H. T. 1834. K. B. 3 *N. & M.* 205.

No assets at the time of "exhibiting the bill," means the issuing of the writ.

IN an action against an executor upon a plea of plene administravit, and no assets "at the time of exhibiting of the bill," the Judge rejected evidence by the plaintiff to prove assets received after the service of the writ, or payment of debts of equal degree by the executor.

And the Court held, that the Judge was right, because, since the Uniformity of Process Act, "the time of exhibiting the bill" means the commencement of the suit by the suing out the writ of summons.

2.—*No Assets.*

REEVES *v.* WARD, M. T. 1835. C. P. 2 *Bing. N. S.* 235; S. C. 2 *Scott*, 390.

A plea of no assets is good after verdict.

IN an action against the defendant as executrix, she pleaded that "she had not, at the time of the commencement of this action, nor at any time, had any goods or chattels which were of the testator's at the time of his death," &c., omitting the words, that "she had fully administered."

The Court held, that the plea, notwithstanding such informality, was, after verdict, good, inasmuch as a substantial issue was joined between the parties, and, if the words omitted had been introduced, no issue would have been raised upon them.

3.—*Judgment recovered.*

Power *v.* **Izod**, M. T. 1834. C. P. 1 *Bing. N. S.* 304; S. C. 1 *Scott*, 119.

In an action against the defendant, sued as administrator, plea of two judgments recovered.

A plea of judgment recovered need not state the day, &c., according to Rule H. T. 4 Will. 4.

The Court held, that the Rule of Hil. T., 4 Will. 4, requiring the date, &c., to be stated in the margin, did not apply to the case of pleas by executors.

Lyttleton *v.* **Cross**, T. T. 1824. K. B. 3 *B. & C.* 317; S. C. 5 *D. & R.* 165.

Declaration on the testator's covenant. After pleas of plene administravit, and retainer for a simple contract, the executor, at the assizes, pleaded puis darrein continuance, a judgment recovered on a bond, "after the last continuance," (the last day of Trin. Term), to wit, on 2nd August, "as of the Trinity Term preceding," to which the plaintiff replied, that the defendants had notice of the bond before the commencement of the action. On demurrer—

In a plea of judgment recovered puis darrein continuance, the defendant may aver that it was obtained after the last continuance to avoid the judgment relating to the first day of term*.

The Court held the replication bad, and that the plea was properly pleaded, although the judgment was alleged to have been recovered of the term, which, by fiction of law, therefore related back to the first day of the term, and so was strictly before the last continuance; yet the defendants might be permitted, by averment, to shew that, in fact, the judgment was recovered after that continuance, in order that they might not be deprived of the privilege allowed by law.

4.—*Bona Notabilia.*

Huthwaite *v.* **Phaire**, E. T. 1840. C. P. 8 *D. P. C.* 541; S. C. 1 *M. & G.* 159; S. C. 1 *Scott, N. S.* 43.

The defendant, who, upon a separation from his wife, covenanted with plaintiff's intestate, deceased in Ireland, and where letters of administration had been granted, to pay the wife an annuity, which was also charged upon lands there, in an action of covenant brought in this country, pleaded that the deceased had bona notabilia in the diocese of London, and so the letters of administration were void.

Bona notabilia is not an issuable plea.

The Court held the plea not an issuable plea within the terms of an order for pleading issuably; but, upon an affidavit of the deed being in London, the defendant allowed to amend.

5.—*Limitation, Statute of*†.

* This case was before Rule H. T. 4 Will. 4, by which the judgment must have date the day it is signed.

† As against executors an acknowledgment merely is not sufficient to take the case out of the statute, but there must be an express promise, and where more than one executor a promise by all. (*Tullock* v. *Dunn*, 1 Ry. & M. 416; see *Atkins* v. *Tredgold*, 2 B. & C. 23. But see 9 Geo. 4, c. 14).

6.—*To Actions on Leases and for Rents, &c.*

RUBERY *v.* STEVENS, M. T. 1832. K. B. 4 *B. & Ad.* 241; S. C. 1 *N. & M.* 182.

In covenant on a lease, a plea, to exonerate an executor, must shew that the premises were of no value at all.

COVENANT by the reversioner of a term against the executors of the lessee. The plea in substance alleged that the premises were not of the value of the rent, to wit, of no value whatever, to which the plaintiff replied that they were of the yearly value of the rent, to wit, 26*l.* The jury found that they were of the value of 20*l.* only.

The Court held, first, that the plea was no bar unless it were shewn that the premises were of no value at all; if they had been less than the rent that part should have been confessed, and a plea pleaded as to the remainder; and secondly, that if the premises were of any value, the plea being falsified, the executors were personally chargeable for such part of the rent as the premises were worth.

TREEMERE *v.* MORISON, T. T. 1836. C. P. 1 *Bing N. S.* 89.

But a plea to an action for rent against an executor, that he has derived no profit from the premises, is bad.

IN covenant against an administrator as assignee, who has entered upon premises demised to his intestate, for non-repair; plea, that the premises were of no value and produced no profit to the administrator—

Per Cur.—The general rule is, that an executor is to be charged as an assignee. The exception is, that he is not liable for rent which the premises do not produce. This is the exception to the general rule; and it is not an authority to shew that, when the executor is charged on a covenant for not repairing, he can plead, as the defendant here has pleaded, that the premises did not produce profit. The subject, therefore, of the present discussion not being within the exception, the general rule must prevail. The plaintiff is entitled to the judgment of the Court.

REED *v.* LORD TENTERDEN, E. T. 1833. Ex. 4 *Tyrw.* 111.

Covenant on a lease. Plea, that the profits were less than the rent, and payment away of those profits, is insufficient, without shewing that the executor had no other assets.

AN executor of lessee was sued in covenant for rent and repairs accruing in his time, and he pleaded, 1st, that the premises vested in him only as executor, and that the profits during his time were less than the rent reserved; and 2nd, payment of a sum, being all the profits ever come to him. On demurrer—

The Court held the plea insufficient; the plea not going on to shew he had no other assets of the testator in his hands to be administered. He pleaded also in other pleas, that the sum so paid before the suit commenced was all the money which remained in his hands, as well of the profits of the premises, as also of all the goods of the testator which ever came to his hands to be administered:—Held bad, for not shewing that he had no other assets between such payment and the commencement of the suit.

7.—*That Executor gave Bill or Note as such.*

SERLE *v.* WATERWORTH, T. T. 1838. Ex. 4 *M. & W.* 9; S. C. 6 *D. P. C.* 684.

If an executor gives a bill or note in respect of a debt due from testator, and only in consideration of such debt, a plea stating the facts must allege the absence of all assets.

THE defendant gave a promissory note for "value received," payable twelve months after date. Plea, that one J. W., before and at the time of his death, to wit, &c., was indebted to the plaintiff in a certain sum of money, to wit, &c., for goods sold and delivered to the said J. W., which was due and owing to the plaintiff at the time of making the said note, and that the plaintiff, after the death of J. W., and before the making of the note, to wit, &c., applied to the defendant for payment thereof, whereupon, in compliance with the said request, the defendant, after the death of J. W., for and in respect of the said debt so then remaining due to the plaintiff, and for no other consideration whatever, then made and delivered the note to the plaintiff. And the defendant further says, that the said J. W. died intestate, to wit, &c., and that, at the time of the making and delivery of the said note as aforesaid to the plaintiff as aforesaid, no administration had been granted of the estate and effects of the said J. W., nor was there at that time any executor or executrix of his estate and effects, nor was there any person liable at that time for the said debt so remaining due to the plaintiff as aforesaid. Replication, de injuriâ, after a verdict for the defendant.

The Court held, that the plaintiff was entitled to judgment non obstante veredicto, as there was good consideration for the note upon the face of it, which the plea did not sufficiently negative, by not stating that there were no assets.

8.—*Puis darrein continuance**. See also ante, p. 21.

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5. *Rejoinders.*

JONES *v.* ROBERTS, M. T. 1833. Ex. 2 *C. & M.* 219; S. C. 2 *D. P. C.* 374; S. C. 4 *Tyrw.* 48.

Plea, payment of a judgment. Replication, it was kept alive by fraud. The rejoinder must traverse the fraud, not the payment.

IN an action against an executor, pleas, 1st, plene administravit; 2nd, an outstanding judgment and plene administravit, except as to a small sum, insufficient to satisfy the judgment. Replication, that the testator paid a sum in full discharge of the judgment, and that it was kept alive in fraud. Rejoinder, traversing the payment. On demurrer—

The Court held the traverse to be immaterial, the payment being inducement only, and the fraud the material part to be put in issue.

* A defendant executor does not preclude himself by referring a cause from availing himself of a plea of judgment recovered puis darrein continuance, while the reference was pending, although it appears from affidavits that he had a certain amount of assets in his hands. (*Alder* v. *Park*, E. T. 1836, B. C., 5 D. P. C. 16).

6. *Evidence.*

FOX *v.* WATERS, T. T. 1840. Q. B. 4 *P. & D.* 1.

The admission of one executor as to the legal effect of a deed does not bind a co-executor; aliter, as to assets.

IN an action of covenant against executors—

The Court held, that, in order to make an admission of one of two defendants evidence against both, a community of interest in the subject-matter of the admission must be previously shewn. In the case of executors, therefore, a statement by one will not bind the other, unless it be made upon a subject-matter properly within that relation as to assets.

PINNEY *v.* PINNEY, T. T. 1828. K. B. 8 *B. & C.* 335.

In an action of trover, the original will is not evidence, the probate must be produced*.

IN trover, it appeared that the plaintiff and defendant were brothers, the horse and gig in question had belonged to their father, who died, leaving certain papers, which, for the present purpose, may be admitted to have been a will. One Francis Pinney claimed to be an executor of this will; but the defendant also claimed to be an executor. The will was never proved, but it was ordered to be produced on the trial.

Lord *Tenterden* hereupon declared, that the probate must be produced, and that the plaintiff had no title as executor, the will not having been proved, and he having shewn no exclusive possession, so as to sue in his own right.—The plaintiff was properly nonsuited.

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7. *Witnesses*†.

* In covenant, by assignees of lessor against the executors of lessee:—Held, that payment of a certain probate duty was primâ facie evidence of their having assets to the smallest amount that duty would cover. (*Curtis* v. *Hunt*, H. T. 1824, N. P., 1 C. & P. 180). The Probate Act book containing an entry that the will was proved, and probate granted:—Held to be the original, and therefore the primary evidence:—Held, therefore, to be sufficient proof that the parties were executors, although the probate was not produced, nor any excuse for its non-production. (*Cox* v. *Allingham*, 1 Jac., Ch. 535). Letters of administration are not primâ facie evidence of the death of the alleged intestate. (*Moore* v. *De Bernales*, 1 Russ. 307). In an action against executors for rent of premises held by the testator under an agreement, and one had suffered judgment by default:—Held, that, after notice to produce given to each, secondary evidence of the receipts given to the latter was admissible, and that the clerk of the attorney might be asked if they did not employ the attorney to act for them as executors. (*Beckwith* v. *Benner*, M. T. 1834, N. P., 6 C. & P. 681). Where, during absence, a special administrator was appointed:—Held, that, although the acts of the executor were admissible against the latter, semb. the mere declarations were not. (*Rush* v. *Peacock*, 1837, N. P., 2 M. & Rob. 162).

† On a plea of plene administravit to an action against an administratrix, an unsatisfied creditor of the intestate is a competent witness for the defendant. (*Davies* v. *Davies*, 1829, N. P., 1 M. & M. 345). But in an action by an executor against the sheriff for a false return:—Held, that the widow of testator could not be called for the defendant, to speak to conversations between herself and her late husband. (*Doker* v. *Hasler*, 1 R. & M. 198; S. P. *Munroe* v. *Twistleton*, Peake, Ev. 44).

(*c*) Costs connected with.

1. *Before* 3 *&* 4 *Will.* 4, *c.* 42.

Marshall *v.* Wilder, T. T. 1829. K. B. 9 *B. & C.* 655.

In an action of assumpsit against an executor on promises by testator, the defendant pleaded—first, the general issue; and, secondly, plene administravit: the plaintiff joined issue on the first, and took judgment of assets quando acciderint on the second plea. In error—

If an executor pleads the general issue, he is liable to costs de bonis propriis*.

The Court held, that the defendant having, by pleading that the testator never promised, compelled the plaintiff to incur the costs of a trial, he was entitled to judgment as to those costs de bonis testatoris et si non de bonis propriis.

Lyttleton *v.* Cross, E. T. 1825. K. B. 4 *B. & C.* 117.

Covenant against executor. Plea, plene administravit, and a retainer. At the trial, the defendants pleaded a plea puis darrein continuance, to which the plaintiff replied, and defendants demurred to the replication. Judgment for the defendants on the demurrer.

Executors who plead judgment recovered puis darrein continuance, and have judgment on demurrer, are entitled to the costs subsequent to such plea.

Per Cur.—We are of opinion, that the defendants are entitled to *their costs*, but that those words mean the costs incurred subsequent to the time of putting in the plea puis darrein continuance. The words of the 8 & 9 Will. 3, c. 11, are not confined to persons bringing frivolous actions; and it is to be remembered that an action well brought may afterwards be frivolously and vexatiously carried on. Here, when the plea puis darrein continuance was pleaded, the plaintiff had the option of submitting or proceeding with the action. He chose to proceed, and having put in a replication bad in law, certain costs were by this act incurred. For those costs we think he is liable.

* An administrator who pleads the general issue and plene administravit, and succeeds on the latter plea, is entitled to the general costs of the cause. (*Iggulden* v. *Terson*, M. T. 1833, Ex., 2 D. P. C. 277). Costs under the 53 Geo. 3, c. 108, on a motion for an executor to account, are discretionary. (*Siratt, Ex parte*, M. T. 1834, Ex., 3 D. P. C. 209). Where executors sued on a bond, and there appeared nothing vexatious, but they afterwards were advised by counsel that a set-off pleaded by the defendants was a good defence, the Court gave leave to discontinue without costs. (*Stubbing* v. *Hammond*, 8 Moore, 689). Where the declaration by an administratrix contained a count on promises to her, and on the trial she was nonsuited:—Held, that the contract stated in that count was one made between the plaintiff and another person within the very words of the 23 Hen. 8, c. 15, and the defendants entitled to costs on those counts in which the plaintiff sued in her own right. (*Dowbiggin* v. *Harrison*, 9 B. & C. 666; S. C. 4 M. & R. 622). Where the cause of action arises in the lifetime of a testator or intestate, and the executor or administrator cannot bring the action in his own name, he is not liable for costs. (*Jones* v. *Wilson*, 6 M. & S. 178). Where, in assumpsit by administrator, the declaration contained a count upon an account stated with and promises to the administrator, the verdict upon the general issue being for the defendant:—Held, that he was entitled to the costs, but as to the pleadings, to the costs of that count only in which the promises were laid as made to the plaintiff. (*Jobson* v. *Foster*, K. B., 1 B. & Ad. 6; see 9 B. & C. 666). Where the promises in the declaration were all laid to the plaintiff as executor, and upon the pleas the general issue and the statute of limitations the defendant succeeded:—Held, that it was so far an action on a contract between the plaintiff and defendant as to entitle the former to his costs under 23 H. 8, c. 15. (*Slater* v. *Lawson*, 1 B. & Ad. 893).

2. *Since* 3 & 4 *Will.* 4, *c.* 42.

By 3 & 4 Will. 4, c. 42, s. 31, executors suing in right of the testator are to pay costs.

By 3 & 4 Will. 4, c. 42, s. 31, it is enacted, "That, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

Pickup *v.* Wharton, H. T. 1834. Ex. 2 *C. & M.* 401; S. C. 2 *D. P. C.* 388.—S. P. Freeman *v.* Moyes, T. T. 1834. K. B. 3 *N. & M.* 883; S. C. 1 *Ad. & E.* 338.

The statute is retrospective, but the plaintiff must have taken a step since the statute to come within it*.

In the year 1832, the plaintiffs, as executors, commenced an action, and arrested the defendant on a promissory note given to the testator in 1812. Notice of trial was given and countermanded for the Lancaster Assizes in 1832, and a rule for judgment as in case of a nonsuit was afterwards discharged on a peremptory undertaking. In Hilary Term, a second rule for judgment as in case of a nonsuit was made absolute, and, on taxation of costs, the Master allowed the defendant the whole of the costs of the cause. On motion to review the taxation, it being suggested that the question, whether stat. 3 & 4 Will. 4, c. 42, s. 31, was retrospective, was pending in the King's Bench, the rule was allowed to stand over until Easter Term, when, after conference with the Court of King's Bench, the Court said, that both Courts were of opinion that the statute was retrospective, but that where the plaintiff had taken no steps since the statute, his situation ought not to be altered thereby.

Ashton *v.* Poynter, H. T. 1835. Ex. 1 *C., M. & R.* 738; S. C. 3 *D. P. C.* 465; S. C. 5 *Tyrw.* 322, *overruling* Lysons *v.* Barrow, E. T. 1834. C. P. 2 *D. P. C.* 807; S. C. 10 *Bing.* 563; S. C. 4 *M. & Scott,* 463; *post, p.* 27.

The 3 & 4 Will. 4 only renders executors liable for costs where not liable before.

In this case the Court said, that the meaning of the 3 & 4 Will. 4, c. 42, s. 31, is, that executors shall be liable in cases where not liable before; and does not affect the case of an executor suing on a promise made to or contract with himself, and a verdict obtained against him, where he would have been before that statute liable to pay costs under that of 23 Hen. 8, c. 15.

Engler *v.* Twysden, M. T. 1835. C. P. 2 *Bing. N. S.* 263; S. C. 2 *Scott,* 427; S. C. 4 *D. P. C.* 330.

The executors ought not to be exempt where circumstances exist which

The plaintiff sued as administrator on a bond given more than twenty years before to his intestate, upon which no interest had been paid, without making sufficient inquiries to ascertain the truth of the defendant's allegation, that he was discharged from such bond

* The statute was held to apply to actions brought before the act, although not tried until after. (*Grant* v. *Kemp,* E. T. 1834, Ex., 2 C. & M. 636).

under the Insolvent Debtors' Act. Upon an application by a plaintiff suing as administrator to have the verdict found for the defendant entered without costs, the Court will take into consideration the degree of care and caution exhibited by the plaintiff in bringing the action; and according to their opinion of the sufficiency or insufficiency of such care and caution, they will grant or refuse the application.

shew they brought the action without proper inquiry.

GODSON *v.* FREEMAN, M. T. 1835. Ex. 2 *C., M. & R.* 585; S. C. 1 *Tyrw. & Gr.* 45; S. C. 4 *D. P. C.* 543.

AN administrator was informed by the intestate's widow, who was the sister of the defendant, that the latter had occupied a farm of her husband for four years, and had not paid the rent; he commenced an action, but was met at the trial by the intestate's receipts.

The executor must ground his claim to exemption from costs by shewing misconduct on part of defendant.

Per Cur.—We are called upon in each case to say whether the costs should or should not be paid. We cannot lay down a general rule; and every time that an executor or administrator has a verdict against him, this application will be made. In *Lysons* v. *Barrow*, (10 Bing. 563), where the executor was relieved from the payment of the costs, it was his duty to attempt to recover the money. This statute is in favour of defendants, and they are not to be deprived of the benefit of it without some misconduct.

SOUTHGATE *v.* CROWLEY, H. T. 1835. C. P. 1 *Bing. N. S.* 519; S. C. 1 *Scott*, 374; S. C. 3 *D. P. C.* 386.

IN this action by an executor, it appeared that the defendants, when applied to to state what objection they had to pay the plaintiff 900*l.*, refused to state their objections, but stated previously the sum they admitted to be due, and then paid that sum into Court, and the verdict was only for that sum. On a question as to costs—

That the action is brought bonâ fide is not sufficient to exempt;

The Court held, that an executor plaintiff who loses his cause is not, under the 3 & 4 Will. 4, c. 42, s. 31, exempted from the payment of costs, unless mala fides appears on the part of the defendant.

WILKINSON *v.* EDWARDS, M. T. 1834. C. P. 3 *D. P. C.* 137; S. C. 1 *Scott*, 173; S. C. 1 *Bing. N. S.* 301.

UPON an application to the discretion of the Court, under 3 & 4 Will. 4, c. 42, s. 31, for the purpose of having judgment as in case of a nonsuit entered against the plaintiff (executor) without costs—

and the Court refused to exonerate an executor from costs after two peremptory undertakings to try.

The Court will take into consideration the conduct of the plaintiff in the cause, and, according to their view of such conduct, they either will or will not exercise the discretion which the statute allows; and refused costs, after two peremptory undertakings to try.

LYSONS *v.* BARROW, E. T. 1834. C. P. 2 *D. P. C.* 807; S. C. 10 *Bing.* 563; S. C. 4 *M. & Scott*, 463. *But see ante, p.* 26.

THE plaintiffs, as executors, brought an action against the defendant to recover the amount of a policy effected on the life of the

Under the 3 & 4 Will. 4, if an

executor be nonsuited upon grounds which he could not apprehend, he is not liable for costs.

testator in the name of the defendant, and received by him, and had been nonsuited, on the ground that the deceased had no interest in the policy.

The Court, under the provisions of 3 & 4 Will. 4, c. 42, s. 31, allowed the judgment of nonsuit to be entered up without costs, inasmuch as the plaintiffs could only have sued in their representative character; and that it was the duty of the plaintiffs to the testator's estate to bring the action, and were only defeated upon the ground which they could not be supposed to apprehend.

EDWARDS *v.* EDWARDS, E. T. 1834. Ex. 2 *C. & M.* 612; S. C. 4 *Tyrw.* 438.

As against creditors, the executor will not be allowed the costs of an ejectment*.

IN an action against an executor—

The Court held that, as against creditors, the executor could not claim to be entitled to the expenses of reconveyance of a mortgaged estate, nor the costs of an ejectment brought by the mortgagee, nor for interest due in the time of a mortgagor prior to the testator.

MADDOCKS *v.* PHILLIPS, T. T. 1835. K. B. 5 *N. & M.* 370; S. C. 3 *Ad. & E.* 198.

When proper to interfere, a Judge at chambers may do so;

IN an action by an executor, a verdict having been found for the defendant, before Mr. Justice *Williams*, the learned Judge was applied to for an order, under 3 & 4 Will. 4, c. 42, s. 31, to exempt the plaintiff from the payment of costs; but his Lordship declined to make any such order at that time.

The Court held, that an order to exempt executor plaintiff from costs, after a verdict for the defendant, is a matter within the discretion either of a single Judge or of the whole Court; and if a single Judge has made an order, such order cannot be reviewed, the decision either of the whole Court or of a single Judge being final.

LAKIN *v.* MASSIE, T. T. 1835. Ex. 4 *D. P. C.* 239.

or the Exchequer, subject to the decision being reviewed by the Court.

IN this case the Court held, that the decision of a Judge at chambers, under the 3 & 4 Will. 4, c. 42, s. 31, as to executor's costs, is not final, but may be reviewed by the full Court.

SPENCE *v.* ALBERT, H. T. 1835. K. B. 4 *N. & M.* 385.

Declaration contained two counts: one on an account stated with the plaintiff, as executor; the other, on promises to the testator. The plaintiff was nonsuited. The Master only allowed the costs of the trial, and the Court refused to interfere.

THIS was an action for goods sold and delivered, with a promise to the testator; also a count on an account stated with the plaintiff, as executor. At the trial the plaintiff was nonsuited; and the Master had, upon taxation, allowed the defendant the costs of the trial. A rule had been obtained, calling on the defendant to shew cause why it should not be referred back to the Master to review his taxation. Cur. adv. vult.; and in the last day of term—

Lord *Denman*, C. J., mentioned the case, saying that the Court had consulted with the other Judges, and that the Court thought this rule should be discharged.—Rule discharged.

* Where one executor verbally undertakes to produce the will at the trial, the defendant will not be entitled to costs of obtaining an exemplification. (*Goldstone* v. *Tovey*, E. T. 1839, C. P., 7 Bing. N. S. 274).

(*d*) Of the judgment and execution*.

Cox *v.* Peacock, T. T. 1835. C. P. 2 *Scott*, 125; S. C. 4 *D. P. C.* 134.

Under plene administravit, the plaintiff is entitled to judgment quando for costs as well as debt.

This was an action of assumpsit against the defendant, as executor, to which there was a plea of plene administravit præter. The plaintiff prayed judgment of assets quando acciderint, for debt and costs.

Tindal, C. J., on a subsequent day, said that the Judges were agreed that the plaintiff in this case was entitled to the judgment prayed.—Judgment accordingly.

Lucas *v.* Jenner, E. T. 1833. Ex. 1 *C. & M.* 597; S. C. 2 *D. P. C.* 64; S. C. 3 *Tyrw.* 564.

After judgment as in case of a nonsuit, the plaintiff was allowed to withdraw his replication, and take judgment for future assets.

The defendant, an executrix, had pleaded the general issue, and plene administravit præter. The plaintiff took issue on these pleas. On a rule for judgment as in case of a nonsuit—

Bayley, B.—It seems to me that the plaintiff has a right to enter up judgment for the assets quando acciderint, on the plea of plene administravit; but it cannot be done at the trial, nor unless the replication is withdrawn; therefore, a summons must be taken out to withdraw the replication, and to have judgment on the second plea.

Ward *v.* Thomas, T. T. 1832. Ex. 1 *C. & M.* 533; S. C. 2 *D. P. C.* 87.

On a judgment against an executor de bonis test. et si non, the plaintiff cannot sue out execution de bonis propriis.

To debt on a bond of defendant's testator, defendant pleaded non est factum; and on a verdict for the plaintiff the plaintiff signed judgment, and took out execution de bonis propriis for debt and costs, and the defendant paid the money under protest.

Bayley, B.—There is no regular judgment de bonis propriis against the executor; and the consequence of not setting this aside would be, that, on error, the judgment would be reversed. The judgment and execution are irregular.

(*e*) Scire facias connected with.

Scott *v.* Briant, E. T. 1836. K. B. 6 *N. & M.* 381.

As executors derive title from the will, and not probate, those not inserted in the probate may join in a sci. fa.

Sci. fa. to revive a judgment obtained by the testator against the defendant. The plaintiffs made profert of the probate in the usual form. Plea, that the plaintiffs were not executors, &c., in manner and form &c.; whereupon issue was joined. At the trial, it appeared that all the plaintiffs were appointed executors in and by the will, but that probate had been granted to John Scott alone, with a reservation of power to the others to come in and prove.

Per Cur.—It is laid down absolutely that in an action by executors all must join, though some do not prove the will, but refuse before the ordinary. The fallacy of the argument consists in supposing that executors are made by the probate, whereas they are created by the will.

* Executors are bound, like other parties, to proceed, or give a stet processus. (*Herbert* v. *Keal*, T. T. 1824, K. B., 4 D. & R. 833).

SNOOK *v.* MARTOCKS, T. T. 1836. K. B. 5 *Ad. & E.* 239.

A writ of error pending is no answer to a sci. fa. to revive a judgment against an executor*.

DECLARATION in sci. fa., upon a judgment for 718*l.* 10*s.* against Thomas Southwood, who died leaving the defendant his executor. Plea, that, after the recovery of the judgment, and before the return of the second writ of sci. fa. in the declaration mentioned, to wit, on &c., the defendant for reversing the judgment sued out a writ of error; which writ of error afterwards, and before the return of the second writ of sci. fa., in the declaration mentioned, to wit, on &c., was delivered to the Chief Justice, (to whom directed), whereof the plaintiff afterwards, and before the return &c., had notice. The defendant further says, that the writ of error is still depending undetermined and in full force, and that the judgment is not yet either affirmed or reversed; concluding with a verification and prayer of judgment. Replication, præcludi non, because, after prosecuting the writ, a transcript of the record and proceedings of the plaintiff was sent to the Exchequer Chamber; which Court afterwards, in Michaelmas Term, quashed the writ of error, and the same then and there became and was determined, and the judgment remains in full force, and affirmed.

The Court held, that it was no plea to a declaration in sci. fa. against an executor, that a writ of error had been sued out before the return of the writ of sci. fa.

(*f*) ATTACHMENTS CONNECTED WITH.

BARWICK, *In re*, E. T. 1835. Ex. 3 *D. P. C.* 703.

Under special circumstances, the Court granted a rule for an attachment against an executor, without personal service.

ON motion for an attachment for disobedience to a Rule of Court, which had been made absolute against an executor for not accounting, several attempts had been made to serve him personally, but without success; and it was alleged in the affidavit, that he kept out of the way to avoid being served. *Parke*, B.—You must make out a very strong case before the Court will allow any thing short of a personal service to be sufficient.

The Court granted a rule nisi, which was afterwards made absolute, no cause being shewn.

(*g*) AFFIDAVITS CONNECTED WITH ‡.

* A rule nisi, to revive a judgment against the executors of a deceased defendant, must be served on all the executors who have proved the will. (*Panter* v. *Seaman*, 5 N. & M. 679).

On sci. fa. to a plea of plene administravit before notice, it is a bad replication that the executors had notice, without alleging that the judgment had been docketed. (*Hall* v. *Tapper*, T. T. 1832, K. B., 3 B. & Ad. 655; abridged, post, tit. *Sci. Fa.*).

† An affidavit intitled by an executor, without stating of whom, seems insufficient. (*Clark* v. *Martin*, M. T. 1834, Ex., 3 D. P. C. 222).

XI. RELATIVE TO EXECUTOR DE SON TORT*.

CAMDEN *v.* FLETCHER, M. T. 1838. Ex. 4 *M. & W.* 378.

The mere ordering the funeral and appropriating a reasonable sum for that purpose, does not make the party an executor de son tort.

ASSUMPSIT on promises by the testator. The declaration contained counts for work and labour and upon an account stated. It appeared that the action was brought to recover the sum of 8*l.* 12*s.* for medicines furnished by the plaintiff, who was an apothecary, to the intestate, who was the mother-in-law of the defendant. The defendant had married the daughter of the intestate, who lived with them, and was entitled to an annuity of 15*l.*, of which 7*l.* 10*s.* had become due shortly before her death. Soon after her death the defendant applied for and received this sum, out of which he paid 5*l.* 16*s.* for her funeral, and there was evidence that he had offered to pay over the balance of 34*s.* to the creditors. It further appeared, that a nurse had attended the intestate at the expense of the defendant for six weeks, for which he had received nothing, and also that she had boarded with him for some time without any remuneration. No other acts were stated to have been done by the defendant to shew that he had ever taken upon himself to act as executor. The jury found a verdict for the plaintiff.

Per Cur.—The mere interference to order the funeral of the intestate, and the payment for it out of money received on account of a debt due to her, will not make a person executor de son tort, but whether he has made himself so by the receipt of more money than is reasonably sufficient for the funeral expenses, regard being had to the condition in life and circumstances of the deceased, is a question for the jury.

SERLE *v.* WAKSWORTH, T. T. 1838. Ex. 4 *M. & W.* 9; S. C. 6 *D. P. C.* 684; *reversed on error*, 4 *M. & W.* 795.

A widow, continuing to live in the house and opening the shop of the testator, but no sale of goods proved, or interference beyond having an inventory taken, not sufficient to make her an executrix de son tort.

IN an action against an executrix, it appeared that the husband of the defendant had carried on business as a hair-dresser, and died upon the 3rd of October, 1836, intestate. The defendant continued to reside in the house which adjoined the shop, but there was no evidence that she had ever sold any articles there or carried on the business since the death of her husband. In November, 1836, she received notice of a bond debt for 100*l.*, and interest, due from her husband. Upon the 31st of December, 1836, the defendant caused an inventory to be made of her husband's effects, and they were valued at 92*l.* About the 3rd of January, 1837, the plaintiff sent in an account to the defendant of a debt due from her late husband, when she gave the note upon which the action was brought. Letters of administration were granted to her upon the 6th of March, 1837. Upon this evidence for the plaintiff the counsel contended that the defendant was executrix de son tort.

The Court held, that the widow did not become executrix de son

* The plaintiff sold to the defendant a rick of hay belonging to a deceased person, and afterwards took out administration to the effects of the deceased, and claimed the price of the hay:—Held, that the defendant could not be relieved under the first section of the Interpleader Act. (*James* v. *Pritchard*, 7 Mee. & W. 216; 8 Dowl. P. C. 890).

An executor, a trader, retaining and mixing balances with his own monies at his bankers, charged with 5 per cent. (*Sutton* v. *Sharp*, 1 Russ. (Ch.) 150).

tort by remaining in occupation of her late husband's house and shop for three months, if she did not in any way carry on the business.

LEWIS *v.* ROGERS, T. T. 1834. Ex. 1 *C., M. & R.* 48.

An executor was also a trustee for the benefit of creditors. The bona fides may be taken into consideration to render him liable as executor de son tort.

A LIST of creditors had been made out by the direction of a trader who had made an assignment for the benefit of creditors to a trustee, for the purpose of informing them of the assignment. In an action against the trustee after the death of the assignor as executor de son tort, the document was produced in order to prove the bona fides of the assignment.

Per Cur.—The plaintiff made out a primâ facie case by shewing, that, on the death of Mrs. Rogers, the defendant intermeddled with the goods, and he sought to charge the defendant as executor de son tort. The defendant, in order to explain the acts of intermeddling, proposes to shew an assignment of the goods to him, and, if he can shew the intermeddling referable to a bonâ fide assignment, he has an answer to the primâ facie case. The person who prepared the assignment, and by whose advice she acted, having taken down a list of the names of those who were represented by her to be creditors, and in whose favour the assignment purports to be executed, that list is tendered in evidence. We think it was admissible as a part of the transaction, and to shew the circumstances under which the assignment was made, all of which were for the jury.

OXENHAM *v.* CLAPP, E. T. 1831. K. B. 2 *B. & Ad.* 309.

An executor de son tort may, after action brought for a simple contract debt, satisfy a specialty and plead it in bar.

ON the question whether an executor sued upon a simple contract debt of the deceased may, between declaration and plea, pay a bond debt, and plead that payment in answer to the action for the simple contract debt.

Per Cur.—The defendant pleaded, in answer to the plaintiff's claim, that after action brought she had disposed of the assets of the deceased in that course of administration which the law allows, viz. by discharging a debt of higher degree; and, if any time before plea pleaded, an executor comes to the knowledge of such a debt, he is bound to pay it before a simple contract debt, whether he be a rightful or wrongful executor. We do not say, that if the payment had been voluntary the defendant could have justified paying a debt of equal degree with that of the plaintiff, because that might have been taking an undue advantage of her own wrong. It is sufficient in this case that the debt paid was a superior debt, and that that sued for by the plaintiff was one by simple contract.

DOE *d.* HORNBY *v.* GLENN, T. T. 1834. K. B. 3 *N. & M.* 837; S. C. 1 *Ad. & E.* 49.

An executor de son tort, to whom administration is afterwards granted, is not bound by an agreement entered into by him.

LESSEE of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered de son tort. B., the brother, agreed with the landlord to give him possession and suffer the lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear. B. afterwards took out letters of administration.

The Court held, that the agreement of B., as administrator de son tort, did not conclude him as rightful administrator, nor give a right

of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease.

DICKENSON *v.* NAULE, E. T. 1832. K. B. 1 *N. & M.* 721.

A. HAVING proved the will of B., in which she supposed herself to be appointed executrix, employed an auctioneer, C., to sell the goods of B. They were sold to D., who, as an inducement to C. to let him remove them without payment, expressly promised to pay C. as soon as the bill should be made out. Probate was afterwards granted to E., the real executrix, who gave D. notice not to pay the price to C. notwithstanding the express promise.

A contract under an executor de son tort may be rescinded after notice from the rightful executor.

The Court held, that C. could not sue D. for the price.

Extent.

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I. RELATIVE TO, BY WHOM OBTAINED, AND IN WHAT CASES.

REX *in aid of* HOLLIS *v.* BINGHAM, T. T. 1833. Ex. 1 *C. & M.* 862; S. C. 2 *D. P. C.* 128; S. C. 3 *Tyrw.* 938.

A party who avails himself of an extent in aid cannot, after paying the Crown, avail himself further of prerogative process*.

HOLLIS, who was a distributor of stamps, issued an extent against Bingham, in 1816, for money due to him, for which he was liable to the Crown. In 1822, Bingham took the benefit of the Insolvent Debtors' Act. At the time the extent in aid of Hollis issued, he was bound to the Crown in a bond with 12,000*l.* penalty. In 1822 Hollis paid the amount of his liability to the Stamp-office, and now applied for an extent against Bingham.

Per Cur.—In substance this question was disposed of in *King* v. *Bingham*, (1 Cr. & J. 379). The decision went no farther than was warranted by the facts of the case; but the opinion of the Court seemed to be, that Hollis could not have a remedy for his own debts on an extent of the Crown. In 1816, there was an extent against Hollis; he issued an extent in aid against Bingham, who was discharged afterwards under the Insolvent Debtors' Act. The consequence would be, that Hollis, as a private subject, would have no right to levy his debt; but having a prerogative process, he says that he is in loco Coronæ, and has a right to proceed. The Crown might enforce payment from Bingham; but if paid aliunde, and there was no need of taking the money out of Bingham's pocket, it would be an abuse of process, if, in the discretion of the Court, we said that Hollis was entitled to the process, not for any debt due to the Crown, but for a debt of a private nature, which was discharged by the Insolvent Debtors' Act. As this was an improper application to the Court to issue a sci. fa., the costs of that should be borne by Hollis. As to the other costs we make no order.

BENNETT *v.* THOMPSON, T. T. 1833. Ex. 2 *D. P. C.* 137; S. C. 1 *C. & M.* 857; 3 *Tyrw.* 823.

An extent cannot be obtained under the 11 Geo. 4 & 1 Will. 4, against the editor of a newspaper and his sureties, unless a writ of

ON a rule nisi for an extent under the 11 Geo. 4 & 1 Will. 4, c. 73, s. 3, against the defendant and his sureties, on the recognizance given in pursuance of the 60 Geo. 3, c. 9, the affidavits in support of the motion stated, that the sheriff had returned nulla bona to the writ of fi. fa., and that the defendant was not to be found. They also stated that no satisfaction could be obtained for the damages or costs; and it was sworn that neither of the sure-

* A party liable to account to the Crown for the proceeds of sales effected by him is entitled to an extent in aid. (*R.* v. *Kynaston*, H. T. 1823, Ex., 11 Price, 598). But a country banker receiving Crown monies, and having entered into the usual bond to pay over the same within twenty-one days after the receipt, is not entitled to an extent in aid, unless there has been an actual breach of the condition, and that shewn in the affidavit; if there has been no breach, he is only entitled to the ordinary proceeding by commission and inquisition to find debts due to the Crown, as in the case of simple contract debtors to the Crown. (*Rex* v. *Tarleton*, 9 Price, 647). So, where the former committee of a lunatic had been declared a bankrupt ten years ago, the Court refused a fiat for an extent in aid at the instance of the new committee, founded upon the bond to the Crown, but left the party to the course by sci. fa. (*In re Lacy*, 10 Price, 136).

ties could be found. It was prayed, that an extent might issue against the defendant and his sureties, and that service of the rule at the last place of abode, and at the newspaper office, might be good service.

execution has previously issued, and due diligence to procure satisfaction has been used.

Per Cur.—The plaintiff must shew that he has used due diligence, and has not been able to procure satisfaction, by writ of execution, against the goods and chattels of the defendant.

II. RELATIVE TO, AGAINST WHOM IT LIES.

REX *v.* WRANGHAM, E. T. 1831. Ex. 1 *C. & J.* 408; S. C. 1 *Tyrw.* 383.

An extent may issue against the agent to an insurance company for duties received by him.

THIS was an application to set aside an extent in chief, which lay upon the defendant's goods, under the following circumstances:—Wrangham was agent at Louth for the County Fire Office, and had received, as such agent, premiums and duties to such an amount that a balance of 451*l.* was due from him to the office; which sum included a sum of 177*l.*, which he had received for government duties; but he kept no account of duties distinct from the premiums, merely accounting for the entire sums to the directors, who had given security to the Crown. No bond or other security was given by Wrangham to the Crown, nor had he any communication whatever with its office. The insurance office, having reason to suspect his insolvency, demanded the balance, which he was unable to pay; and upon affidavits made, which were satisfactory—

The Court allowed an immediate extent for the 177*l.*, returnable on the 15th of April, on which his effects were extended, although, upon the 15th of April, a commission of bankrupt issued against Wrangham, on which he was declared a bankrupt, and a provisional assignee was appointed, to whom an assignment was made.

III. RELATIVE TO THE FORM OF THE WRIT*.

REX *v.* MABERLEY, H. T. 1834. Ex. 2 *D. P. C.* 383.

An immediate extent cannot be ante-dated.

ON an application, on the part of the Crown, for a rule absolute in the first instance for a writ of immediate extent, tested the 22nd day of February, 1832, the date of the fiat—

Bayley, B.—It has more than once been considered by different Judges in this Court, that an extent ought not to be ante-dated, as it may affect intermediate rights.

* It seems an extent against the lands and tenements of the Crown debtor only, and not against goods and chattels, is irregular. (*R.* v. *Lambe*, 1 M'Clel. 402).

IV. RELATIVE TO WHAT MAY BE TAKEN UNDER IT.

REG. *v.* LANE, E. T. 1840. Ex. 6 *M. & W.* 489.

Renewable leaseholds are extendible;

LANDS were held by a debtor to the Crown under a renewable lease for lives from a collegiate body, which lands having been seized under an extent in aid under the 25 Geo. 3, c. 25—

The Court made an order for the sale of the lands under that statute.

ATTORNEY-GENERAL *v.* GIBBS, T. T. 1829. Ex. 3 *Y. & J.* 333.

but fixtures not in custody of the tenant within the meaning of the 34 Geo. 3, c. 20, cannot be seized.

UNDER an extent, the sheriff having seized certain property in the possession of Moody, a paper-maker, the defendants entered their claim, and pleaded that Moody had no greater interest in the goods than as their tenant, and that, subject to that interest, the property was in them. The Attorney-General traversed the title of the defendants, and claimed the goods on behalf of the Crown, as utensils for the making of paper in the custody of Moody, being a paper-maker, and indebted to the King for the duties of excise upon paper.

The Court held, that fixtures demised with a paper-mill, and used by the tenant in the manufacture of paper, were not liable to be seized under an extent for duties upon paper owing by the tenant to the Crown, as utensils for the making of paper in the custody of the tenant, under the stat. 34 Geo. 3, c. 20, s. 27.

REX *v.* HUMPHERY, H. T. 1825. Ex. 1 *M'Clel. & Y.* 173.

Under an extent the Crown can claim no greater interest than the debtor;

ON an extent against a wharfinger—

The Court held, that the lien of a wharfinger for his general balance accruing before the teste of an extent was privileged against the Crown, who can claim no greater interest than the debtor had. And *per Graham*, B., there is no distinction between the cases of a wharfinger and a warehouseman,—dub. *Garrow* and *Hullock*, BB.

And see Rex v. *Lee*, 6 *Price*, 369; *Naylor* v. *Mangles*, 1 *Esp.* 109; *Spears* v. *Hartly*, 3 *Esp.* 81.

REX *v.* TOPPING, T. T. 1825. Ex. 1 *M'Clel. & Y.* 544.

as on an extent against a lessee, the right of the Crown can only be co-extensive with his right.

CERTAIN premises had been demised, with the erections, engines, &c., and a proviso, that in case the property should be "extended or taken in execution," that the term should cease and determine; and it appeared from the whole tenor of the covenants to have been the intention of the parties, that, in case of the determination of the demise by forfeiture, the lessees were not to be at liberty to remove any of the fixtures, &c., but that the lessor was to have them to compensate for the loss he might sustain by the forfeiture. Upon demurrer to the claim of the reversioner, upon the premises, &c., being taken under an extent against the lessee—

The Court held, that the claimant was entitled to judgment and an amoveas manus; the right of the Crown can attach only and be commensurate with the right of the lessee, and the question is precisely the same as if it had arisen between the parties themselves.

V. RELATIVE TO THE PRACTICE CONNECTED WITH, AND OF THE INQUISITION.

Rex *v.* Marsh, M. T. 1824. Ex. 1 *M'Clel.* 681.

An account will not be directed to be taken till whole fund seized be under the control of the Treasury*.

An extent in chief had been issued for the recovery of a sum of money, being proceeds of assessed taxes for part of a year, deposited by a collector with a banking-house which had stopped payment; and such sum was partly composed of balances left in the hands of the collector upon his several monthly payments to the receiver-general: the Court refused to refer it to the King's Remembrancer to see (in effect) whether the poundage of all those payments ought not to be deducted from the sum mentioned in the extent, as being the collector's and not the King's money, upon the grounds, 1st, that the application was without precedent; 2nd, that the collector's title did not accrue till the completion of his collection and payment of his entire assessment; 3rd, that the same did not come within the jurisdiction of this Court as a debt or liquidated demand, but was subject to the control of the Lords of the Treasury, who have all the requisite accounts before them, as an equitable claim to be adjusted or wholly disallowed according to circumstances; 4th, that it would be impossible for the Master without the accounts to see whether ultimately the collector would have any claim.

Rex *v.* Winkles, M. T. 1824. Ex. 1 *M'Clel. & Y.* 33.

Where a party against whom an extent has issued becomes bankrupt, his assignees may have an inspection of books seized under the extent.

Property and books of accounts had been seized under an immediate extent in chief, issued against a collector of taxes and his partner in trade for a debt to the Crown, and a claim had been entered by the assignees of the defendants, who had become bankrupts. Application had been made to the solicitor for the affairs of taxes on behalf of the assignees for permission to inspect the books, but it was refused till the claim entered by the assignees should have been disposed of.

The Court held, that the assignees were entitled to an inspection and copies, &c. of the books previous to the trial of the issue between them and the Crown.

Rex *v.* Marsh, M. T. 1824. Ex. 1 *M'Clel.* 688.

On an application against a surety on a bond, a breach of the condition must be distinctly shewn in the affidavit†.

The affidavit on a bond, given by a deputy-postmaster of a foreign colony, only stated, that he was justly and truly indebted to the Crown for the postage of divers mails of letters sent to him as such deputy-postmaster at J., from the General Post-Office, London.

The Court held, 1st, that it was too ambiguous and not necessarily implying a breach of the condition, and therefore insufficient; and 2ndly, that where the application is against a surety, it need not shew a previous application to the principal for payment, nor that he was in decayed and insolvent circumstances.

* Semble, that the Court of Exchequer has power to refer it to the Master to take an account of the rents and profits of land extended to the plaintiff, and to order him to refund the overplus, if it shall appear that he has been overpaid. *Brookbank* v. *Miers*, 4 D. P. C. 49.

† Where a party has, upon an inquisition under an extent against a Crown debtor, been found a debtor to him, and an extent in chief in the second degree

REX *v.* CRACROFT, T. T. 1825. Ex. 1 *M'Cl. & Y.* 460.

If the Crown acts upon an erroneous inquisition, it may move the Court to annul the sale*.

LANDS were seized into the hands of the Crown under two extents in chief, issued against defendant in 1819, and were sold in lots before the late deputy remembrancer, at Abergavenny, in 1822, pursuant to the 25 Geo. 3, c. 35. Thomas Jones became the purchaser of one lot, described in the particulars of sale conformably to the description in the inquisition, as "a moiety of a freehold;" and was approved of as such by the deputy remembrancer's report, which was, in 1823, confirmed by the usual orders, conditional and absolute. However, upon an inspection of the title-deeds, it appeared that a title to an estate in the premises for the life of the defendant's father was all that could be made out by the Crown.

The Court held, that the Crown may move to discharge the purchaser without his consent and without payment of his costs, incurred in consequence of the purchase.

REX *v.* SOULBY, H. T. 1827. Ex. 1 *Y. & J.* 249.

Parties claiming goods found by inquisition to belong to defendant cannot, on demurrer, dispute the regularity of the proceedings.

PARTIES claimed goods which had been found by inquisition to be the property of a defendant under an extent; there were issues in fact and a demurrer to the proceedings upon the extent. On the demurrer coming on for argument—

Per Cur.—What advantage could the claimants derive from a judgment in their favour upon this demurrer, there being issues upon the record which deny their title? Whether the debt be or be not due to the Crown is immaterial, unless the claimants are entitled to the effects; but issues are taken upon that fact, and until those issues are found for them, they can have no ground to object to the proceedings of the Crown.

REX *v.* BARBARY, E. T. 1821. Ex. 10 *Price*, 46.

Upon an extent, the Court will not interfere to control the pleadings.

THE Court said, we cannot interfere upon motion to control the pleadings upon any matters contained in the affidavit on which the fiat was obtained, as upon an alleged departure or variance from the claim set forth in the affidavit; but if it should turn out to be an abuse of process, to enable persons not entitled to it to procure an extent, the Court would, it seems, by staying proceedings after verdict, or otherwise, protect the parties from such abuse.

issued against him:—Held, that he could not avail himself of any alleged formal objection to the sufficiency of the affidavit for issuing the first extent; and semble, it was no objection to such affidavit that it did not state expressly, nor was in fact shewn from circumstances, that the Crown debtor was in insolvent circumstances, it appearing that there were other allegations in the affidavit sufficient to warrant the fiat. (*Rex* v. *Bell*, 11 Price, 772).

* Upon an inquisition issued to find whether any debt was due to the Crown for arrears of duties, the parties refusing to produce their books before the commission, until an indemnity given not to proceed for penalties which the contents must shew to have been incurred, and an attachment moved for:—Held, that the solicitor of the Excise could not of his own authority give it, and that the proceeding by bill for duties was a waiver of penalties. (*Rex* v. *Dansey*, 12 Price, 588).

VI. RELATIVE TO PRIORITY.

GILES *v.* GROVER, H. T. 1827. Ex. 1 *Y. & J.* 232.

In error, quære, whether an extent, not tested before execution executed at the suit of a subject, is entitled to priority.

IN error, on the question whether the goods seized by the sheriff under a fi. fa., at the suit of a subject, are protected against an extent tested and issued after the seizure, but before sale.

Lord Chancellor.—Under the circumstances of this case, there having been this difference of opinion between the Courts of K. B. and C. P. and Exchequer, and the two learned Chief Justices not being able to agree in any decision upon the question, although I have an opinion upon the subject, the best and most proper course, in my judgment, to dispose of it, in order that it may be formally decided by the Court of last resort, will be to affirm the judgment, that there may be an appeal to the House of Lords.—Judgment affirmed.

GILES *v.* GROVER, 1832. Dom. Proc. 9 *Bing.* 128; S. C. 2 *M. & Scott,* 197; S. C. 12 *Price,* 2.

On error in the House of Lords:—Held, that an extent had precedence, though tested after seizure under a fi. fa.

GOODS were taken under a fi. fa., removed into the sheriff's hands, and, before sale, a writ of extent in aid issued against the same defendant, as debtor to the Crown debtor, tested after the seizure under the fi. fa.

The Court held, that the goods were liable to satisfy the Crown debt before the judgment debt of the subject, and that it was immaterial whether the writ of extent was in chief or in aid; affirming the judgment of the Court of Exchequer. Per *Patteson, Alderson, Taunton, Vaughan, Bayley, Park,* and *Tindal,* JJ., and *Tenterden,* L. C. J.—contra *Gaselee* and *Littledale.*

REX *v.* LAMBE, T. T. 1824. Ex. 1 *M'Clel.* 402.

A term in premises reserved by the vendors of an estate, to secure part of the purchase-money, is paramount to the Crown debtor.

VENDORS, at the time of conveying the premises, reserved to themselves a term, as a security for the residue of the purchase-money not paid.

The Court held that, never having been vested in the vendee, or in any trustee for his benefit, nor having become a term to attend the inheritance, the present holders, being assignees of the term from the original incumbrancers, had a title paramount to the Crown debt, and were therefore not liable to the extent. Where the term attends the inheritance, the claim of the Crown attaches upon it as well as upon the inheritance, and whether the Crown's debtor has a legal or equitable estate; but it does not affect a term for years or in gross until the teste of the writ.

VII. RELATIVE TO INCUMBRANCERS.

REX *v.* RAWLINGS, T. T. 1823. Ex. 12 *Price,* 334.

The Court will allow incum-

AN extent had issued, and an inquisition had been found, under which the jury found a party to be a prior incumbrancer on the lands

brancers to come in and claim.

of the Crown debtor. A second extent afterwards issued, under which a debt to the Crown was found long antecedent to the debt of the incumbrancer.

The Court held, that it was no objection that the second extent also included the debt first found; and that the incumbrancer was not of right entitled to notice of the taking of the second inquisition. The Court, however, permitted him to come in and claim.

VIII. RELATIVE TO THE SALE*.

REX *v.* BULKELEY, H. T. 1827. Ex. 1 *Y. & J.* 255.

A motion for the sale of lands need not be made personally by the Attorney-General;

ON an application on behalf of the Attorney-General, that certain lands, which had been extended by a writ of extent, might be sold, pursuant to the stat. 25 Geo. 3, c. 35—

The Court at first thought the motion must be personally made; but the officers of the Court stated that such motions were frequently made on behalf of the Attorney-General, and drawn up in his name; and *Jervis* and *Clarke* said they had themselves made motions of the same description in the name and on the behalf of the Attorney-General.—Motion granted.

REX *v.* BLUNT, H. T. 1828. Ex. 2 *Y. & J.* 120.

but an interest in land can only be sold under an order of the Court.

UNDER an extent, an interest in premises leased for lives, and for a further term of years after the decease of the survivor, had been extended and sold by the sheriff under a writ of venditioni exponas, but no order of Court had been obtained for the sale, under the 25 Geo. 3, c. 35.

The Court refused to confirm the sale, and order the Remembrancer to execute a conveyance to the purchaser.

REX *v.* MARSH, T. T. 1829. Ex. 3 *Y. & J.* 331.

A sale under an extent is void, if a puffer were employed by the auctioneer.

UPON a sale under an extent—

The Court held, that the employment of a puffer at a sale by auction of property seized under an extent by an agent of the Crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale.

REX *v.* MARSH, E. T. 1831. Ex. 1 *C. & J.* 406.

But if an agent, employed by the Crown for the sale of property

ON the question whether a sale under an extent is not vitiated as against a purchaser, by the agent of the Crown making a bonâ fide bid for himself—

* An extent having issued against the defendant, certain freehold property was seized and sold under the 25 Geo. 3, c. 35. The purchaser having paid the purchase-money into the Bank, afterwards, and before any conveyance was executed, sold the property to another person for a less sum; and, in order to avoid the necessity of paying the ad valorem duty on two conveyances, applied to the Court that the sub-purchaser's name might be substituted in the original conveyance for that of the original purchaser. The Court declined to grant the application, unless with the consent of all parties; which was afterwards obtained and an order made. (*Rex* v. *Rawlings*, T. T. 1835, Ex., 2 C., M. & R. 471; S. C. 4 D. P. C. 407).

Per Cur.—The creditors might have had a right to apply to set aside the sale, but you are applying on the part of the purchaser. The reason why an agent is not allowed to bid is for the sake of the seller; he is not allowed to avail himself of the knowledge he may have acquired as agent.

under an extent, bids bonâ fide for himself, the sale is not vitiated.

REX *v.* DYER, H. T. 1825. Ex. 1 *M'Clel. & Y.* 261.

EXTENT and inquisition having been returned and filed, and no claim to the property seized having been entered, on the 23rd of July, 1824, the Attorney-General, on behalf of his Majesty, applied to the Court for a sale of the said estate by public auction, pursuant to the stat. 25 Geo. 3, c. 35, in Sussex, by or before William Lambert, Esq., the collector of excise at Lewes. It was represented that this mode of disposing of the property would effect a considerable saving of expense; and it was accordingly ordered that all the right, title, estate, and interest of the defendant, his heirs and assigns, in the premises, should be sold in the manner mentioned, for the best price or prices that could be procured, at such time and place and in such lots as should be appointed and advertised by the said collector; and that he should take down the several buildings, and certify the same, and the name and residence of the best bidder, to this Court. And the other directions usual on sales of extended real estates, under the rules of the Court for conveyance to the purchaser or purchasers by the King's Remembrancer, &c., were added.

The Court granted the application.

Upon an Excise extent, on the sale of real property seized, the Court directed a collector of excise to be present.

IX. RELATIVE TO LEVYING THE FINE.

REX *v.* SHACKELL, T. T. 1825. Ex. 1 *M'Clel. & Y.* 514.

UPON an extent, it appeared that three defendants, sentenced by the King's Bench to pay fines amounting in the whole to 1,600*l.*, and to be imprisoned for different terms, and until satisfaction of the fines, paid the fines at the expiration of the respective terms to the Marshal of the King's Bench Prison and the King's Coroner, and were thereupon severally discharged out of custody in August and October, 1822; and the latter officer, in Hilary and Trinity Terms, 1822, certified into the Exchequer 1,300*l.* of the fines as fines imposed and not received, and in Hilary Term, 1823, certified all the fines into the same Court as fines received; however, the summons of the green wax was issued by the deputy clerk of the foreign estreats to the sheriffs of Surrey and Middlesex successively, for the levying of the fines estreated as not received, who, on their apposals, returned nihil, and those returns were transmitted by the clerk of the estreats (who did not read or know the contents of the estreats of fines received, and retained the same in his own hands without transmission further) through the clerk of the nihils to the Pipe-office, and entered on the great roll as debts of record, and as such passed to the Lord Treasurer's Remembrancer's office, from which a writ of extent for their recovery issued of course on the seal day

A party fined is not, after an effectual levy, bound to see that the fine has been properly discharged.

after Trinity Term, 1824, to the sheriffs of London, whose officer, not having any original receipt produced to him, seized the effects of two of the defendants, and continued in possession twenty-four hours, but then, on investigation of the circumstances, withdrew.

Per Cur.—It is quite impossible to sanction as a part of a general practice that which has happened in this case. It is not possible to impose as a general rule that which has been contended for, viz. that a party bound by an order of any court of justice to pay a sum of money, and to be imprisoned till it be paid, should, after having made the payment, be subjected to the additional burden of seeing that the debt has been properly discharged. Such a rule would be contrary to all the principles of justice, and cannot be endured here.

X. RELATIVE TO SETTING ASIDE.

REX *v.* MARSH, H. T. 1825. Ex. 1 *M'Clel. & Y.* 250.

If an extent be set aside, and the property passes to the assignees of the debtor, a bankrupt, it cannot be taken under a second extent.

ON motion to stay proceedings under an extent, it appeared that personal estate was seized under the Crown's extent, which was afterwards set aside for irregularity, and the effects ordered to be delivered up to the assignees of the debtor, duly appointed under a commission of bankrupt sued out, after the teste of the extent; a second extent, tested the day the first was set aside, and subsequently to the assignment, was issued, and delivered to the sheriff before the execution of the order by delivery of the goods to the assignees, the sheriff still holding them in his custody.

The Court held, that the property in the effects had been changed and transferred by the assignment; that the Crown had no lien thereon, and, consequently, that the assignees were entitled to reduce them into possession.

XI. RELATIVE TO THE DISCHARGE FROM.

REX *v.* BINGHAM, M. T. 1831. Ex. 2 *C. & J.* 130; S. C. 2 *Tyrw.* 46.

After a reference to arbitration upon an extent, and award made, if the debtor takes the benefit of the Insolvent Act, he is discharged.

IN 1817, property of Bingham having been seized under an extent in aid of Hollis, Bingham traversed the inquisition thereon; and all matters in difference between him and Hollis were referred to arbitration. On security given by Bingham, an amoveas manus issued to liberate the property seized; and in 1822 he was discharged under the act for the relief of insolvent debtors, inserting the debt to Hollis in his schedule, and Hollis appearing to oppose his discharge. Sometime after the arbitrator made his award.

Lord *Lyndhurst*, C. B.—This must be treated merely as an individual transaction between Bingham and Hollis, who deal with the debt as a private debt, and refer it to arbitration without consulting the Crown. The effect of this is, that the defendant's discharge under the Insolvent Debtors' Act, revokes that which has been done without the authority of the Crown, and vacates the award.

XII. RELATIVE TO WRIT OF ERROR ON.

REX *v.* BURNS, T. T. 1827. Ex. 1 *Y. & J.* 579.

A writ of error does not divest the Crown of the right to have the money paid over.

ON a judgment for the Crown, in an action for penalties, an extent was issued, and a levy made by the sheriff; and whilst the money levied was in the sheriff's hands, the defendant brought a writ of error.

The Court, on application, ordered the money to be paid by the sheriff to the officer of the Crown, notwithstanding it was objected, that, if the judgment were reversed, the party would not be able to obtain a writ of restitution, but would be driven to a petition of right, the Court holding that the Crown could not be placed in a worse situation than a subject under similar circumstances; and that the Court could not take notice that greater difficulties existed in obtaining restitution from the Crown than from the subject.

Extinguishment.

DENNETT *v.* PASS, M. T. 1834. C. P. 1 *Bing. N. S.* 388; S. C. 1 *Scott*, 218.

If a testator charges an estate with an annuity, and afterwards devises the estate to the annuitant, the annuity is extinguished.

THE testator having before, by settlement, charged certain estates with an annuity to his wife, afterwards, by will, charged all his estates, amongst others, with the payment of a small annuity to her, and then devised to her for life the premises on which such annuities were charged.

The Court held, that by such devise, although declared to be made over and above what had been before settled on her, the annuities became extinguished; and the charge being clear, but, the intention of the testator to transfer the charge from the real to the personal estate equivocal, held that the charge continued.

Extortion. See tit. *Sheriff.*

Extorting Money. See tit. *Threatening Letters.*

Extra Work. See tit. *Work and Labour.*

Factor. See tit. *Principal and Agent.*

Faculty. See tits. *Ecclesiastical Persons—Pew.*

Fair.

Earl of Egremont *v.* Saul, T. T. 1837. K. B. 6 *A. & E.* 924.

The words in an original grant, "cum omnibus liberis consuetudinibus, &c., ad feriam pertinentibus," do not, it seems, include tolls.

In debt for tolls, it appeared that the plaintiff claimed a toll of 1*d.* per head on all cattle sold at Wigton fair, of which fair he was the owner. He gave in evidence many leases of the tolls from the year 1683 to the present time, and a grant from Henry I., in the following terms:—"Henricus, Rex Angliæ, &c., episcopis, &c., sciatis nos concessisse et hâc cartâ nostrâ confirmâsse dilecto, &c., Waltero de Wigton quod ipse et hæredes sui in perpetuum habeant unum mercatum singulis Septimanis per diem Martis 6, apud manerium suum de Wigton, et unam feriam ibidem singulis annis per tres dies duraturam,—viz. in vigiliâ, et in die et in crastino nativ. B. Mariæ, nisi mercatum illud et feria illa sint ad nocumentum vicinorum et vicinarum feriarum. Quare, volumus et firmiter præcipimus pro nobis et hæredibus nostris, quod prædictus Walterus et hæredes sui in perpetuum habeant prædictum mercatum, et feriam prædictam, apud manerium suum, cum omnibus libertatibus, et liberis consuetudinibus, ad hujusmodi mercatum et feriam pertinentibus, &c.;—and also the proceedings in a quo warranto, in the 20th Edw. I., against one John de Wyghelm, to know by what authority he claimed to hold the fair at Wigton, and the right of infangthef and outfangthef; to which he pleaded that he claimed the fair under a charter, by which King Henry the Third granted and confirmed the market; and the infangthef and the outfangthef he claimed by prescription. Lord *Abinger*, C. B., in his charge to the jury, told them that in ancient documents the word consuetudo of itself signified toll; and the jury found a verdict for the plaintiff. On motion for a new trial—

Per Cur.—The question is, whether the lord is entitled to the tolls of the market. To prove his right, he put in the grant of a market by King Henry I., in which he used the words concessisse and confirmâsse, and granted the market cum consuetudinibus. It was conceded, that, where there is a charter of confirmation, that word might signify tolls; but the Judge told the jury that it would have the same effect in a new grant, and they may have given their verdict upon that direction, though this was a charter of grant, and not of confirmation. With all possible respect for the learned Judge, we have thought it right to pause on that ruling, and to examine all the cases and authorities upon this point. We can find no instance in which it has had that strict operation. In Co. Litt. 58. b. it is said that "consuetudo properly signifies a custom; but in legal understanding it also signifieth tolls, murage, pontage, paviage, and such like, newly granted by the King;" but it is never used to signify toll in the sense attributed to it by the learned Judge in this case. There are two cases, one in Coke and the other in Strange, where it was laid down that the word "consuetudo," in a grant of a market, would not carry market tolls. This verdict, therefore, which was possibly given upon this instruction, cannot stand.

False Imprisonment. See tit. *Imprisonment.*

False Judgment*.

False Pretences†.

I. RELATIVE TO WHAT AMOUNTS TO, p. 45.

II. RELATIVE TO THE INDICTMENT, p. 46.

III. RELATIVE TO THE EVIDENCE, p. 48.

IV. RELATIVE TO THE PUNISHMENT, p. 48.

I. RELATIVE TO WHAT AMOUNTS TO.

REG. *v.* CROSSLEY, 1837. N. P. 2 *M. & Rob.* 19.

THE prisoner, having accepted a bill drawn by the prosecutor, had stated that he could raise all the amount for taking it up, except 300*l.*, which the prosecutor consented to advance, but the prisoner applied it to his own use, and suffered the bill to be dishonoured.

False pretences mean every mode of obtaining money, either by loan or transfer;

The Court held, that the act embraced every mode of obtaining money by false pretences, by loan as well as by transfer; and that, if the jury thought that he was stating a deliberate falsehood to obtain the money, and that he knew at the time he had not the funds to take it up, and meant all the time to apply the 300*l.* to his own use, the offence was complete.

* The 19 Geo. 3, c. 70, it seems, applies only to courts of record. A return by the sheriff to a writ of false judgment, "that the plaintiff in error hath not given security to prosecute his suit with effect:"—Held bad. (*Crookes* v. *Longden*, E. T. 1839, B. C., 7 D. P. C. 413).

† By 7 & 8 Geo. 4, c. 29, s. 53, after reciting, that "whereas a failure of justice frequently arises from the subtle distinctions between larceny and fraud," it is enacted, "That if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the Court shall award; provided always, that if, upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor, and no such indictment shall be removable by certiorari, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the said facts."

WICKHAM *v.* REGINA, E. T. 1839. Q. B. 10 *Ad. & E.* 34; S. C. 2 *P. & D.* 333.

but the prisoner must know the document was worthless*.

INDICTMENT for obtaining money under false pretences. The false pretences alleged were, that the prisoner stated that he was a captain in the East India Company's service, and that a note was a good and valuable consideration for the sum of 21*l.*

The Court held, that it not appearing that the note was his own, or that he knew it to be worthless, the latter false pretence was insufficient, and the two being to be taken together as the means of defrauding, the indictment was bad, and judgment reversed.

II. RELATIVE TO THE INDICTMENT.

REG. *v.* MARTIN, T. T. 1838. Q. B. 3 *N. & P.* 472.

The indictment must state the persons on

IN error upon an indictment which stated that G. M., late of &c., and Elizabeth, his wife, contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud one W. J. Holt of his

* Where money was obtained from the prosecutor by two prisoners by a trick, under pretence of a wager with one, the other persuading and receiving the money as stakeholder:—Held, that, if the jury were satisfied it was obtained from the owner with a preconceived intention to convert it to a joint use, then it would amount to a felonious taking; but to convict both, the jury must be satisfied they were acting in concert. (*Rex* v. *Wynne*, 1819, N. P., 1 Gow, 223).

Where a party obtained money by a pretence which he knew at the time to be false:—Held, it was immaterial that the party from whom he obtained it laid a plan to entrap him into the offence. (*Rex* v. *Ady*, 1835, C. C. C., 7 C. & P. 140). And where an attorney, who appeared for a party summarily convicted and fined 2*l.*, represented to his wife that he had before prevailed in compromising a similar case for 1*l.*, and that, if she would give him a sovereign, he would go and do the same for her, it appearing that he had never made any such application, but that both the fines were paid in full:—Held, that it was an obtaining money by false pretences. (*Rex* v. *Asterley*, 1835, N. P., 7 C. & P. 191). But it cannot be deemed a false pretence where a party takes a covenant as a security. (*Rex* v. *Codrington*, 1825, N. P., 1 C. & P. 661). And where it would have been a breach of the law in the drawer of an order for payment of money, which ought to have been stamped, to have drawn it without:—Held, that it was not a valuable security within the 7 & 8 Geo. 4, for the obtaining of which by false pretences the party might be indicted. (*Yate's case*, 1827, 1 Moody, C. C. 170). So, where the prisoner, having previously banked with the prosecutor, obtained further advances on his promising to procure a good bill as a fund for repayment, and delivered a pretended good bill, but which was not so:—Held, that, as all which was obtained was credit on his account, and not any specific sum on the bill, the conviction for obtaining money on false pretences was wrong. (*Wavell's case*, 1829, 1 Moody, C. C. 224).

Where the prisoner had represented himself as a gentleman's servant living at B., and that he had bought twenty other horses at the same fair, which he had at an inn, and that, if the prosecutor would take down his filly there, he would pay him the price agreed; but the prosecutor stated that he parted with his filly, not on account of his believing any of the pretences charged, but because he expected the purchaser would call at the inn and pay him:—Held, that, if the jury believed that he parted with his property only on such expectation, the prisoner was entitled to be acquitted. (*Rex* v. *Dale*, 1836, N. P., 7 C. & P. 352).

Where the prosecutor owed the prisoner's master money, and the prisoner obtained goods from the prosecutor's wife by representing that his master had bought them:—Held, that, if the jury thought that the prisoner only intended to put it into his master's power to enforce a just debt, and not to defraud the prosecutor, the prisoner was entitled to be acquitted. (*Rex* v. *Williams*, 1836, N. P., 7 C. & P. 354).

goods and merchandises, on &c., unlawfully did falsely pretend to one E. J., then and there being an apprentice to the said W. J. H., that the said G. Martin was a housekeeper at Little Gowerby, and had opened a shop there, and wanted to purchase candles and starch, in order to sell the same again by retail; whereas, in truth and in fact, the said G. M. was not &c. And that the said G. M. and Elizabeth, his wife, by false pretences aforesaid, did then and there unlawfully, knowingly, and designedly obtain from the said W. J. H. divers goods and chattels, to wit, &c., with intent then and there to cheat and defraud the said W. J. H. of the same, concluding contra formam statuti. The defendants had pleaded not guilty, and were convicted. There having been a joinder in error—

whom the false pretence was practised*.

Littledale, J.—There can be no doubt, that, after a judgment by default, this indictment would have been bad, because it ought to have described the owner of the goods.

* An indictment under the stat. 7 & 8 Geo. 4, c, 29, for obtaining money, &c. under false pretences, is not good, unless, in addition to the false pretence, it contains the requisites of a count for larceny; and if it do not allege the money, &c. obtained to be the property of any person, it will not be sufficient, inasmuch as it could not in that state be pleaded as a bar to a subsequent indictment for larceny, which it is made by the proviso contained in the 53rd section. (*Reg.* v. *Norton*, 1838, C. C. C., 8 C. & P. 196).

On an indictment upon 30 Geo. 2, c. 24, s. 1, it is only necessary to shew the false pretences, and that by means of such the defendants knowingly and assignedly obtained the goods, negativing the pretences; where therefore, in setting out the false pretences, it was alleged that the defendant "unlawfully, knowingly, and assignedly," did falsely pretend, &c.:—Held, that as those introductory words might be struck out, the use of the word *assignedly* for *designedly* was immaterial. (*Rex* v. *Howarth*, 1811, N. P., 3 Stark. 36). But, in a subsequent case, an indictment on a charge of obtaining goods under false pretences was held bad, because it stated that the prisoner "unlawfully, knowingly, and designedly, did feloniously pretend," &c. (*Rex* v. *Walker*, 1834, C. C. C., 6 C. & P. 657).

An indictment for false pretences charged in the first count, that the defendant "unlawfully did falsely pretend to one J. B., that he the said J. T. was sent by W. P. for an order to go to J. B. for a pair of shoes," by means of which false pretence he did obtain from J. B. a pair of shoes of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings of the monies of J. L. The second count charged that he falsely pretended to J. L., that W. P. had said that J. L. was to give him, the said J. T., (the defendant), an order to go to J. B. for a pair of shoes, by means of which false pretence he did obtain from J. B. in the name of J. L. a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same:—Held, that both these counts were bad in arrest of judgment, as neither of them charged a sufficient false pretence within the stat. 7 & 8 Geo. 4, c. 29, s. 53. (*Reg.* v. *Tully*, 1840, N. P., 9 C. & P. 227).

Where the goods received were obtained by false pretences:—Held, that the indictment alleging only that the prisoner received the goods, knowing them to have been "unlawfully obtained, taken, and carried away," was insufficient: it ought to appear that the knowledge was of their having been obtained under false pretences to bring the case within the 7 & 8 Geo. 4, c. 29, s. 55. (*Reg.* v. *Wilson*, 1838, 2 Mood. C. C. 52).

Obtaining goods on a cheque drawn by the prisoner on bankers where he had no account, representing that he had an account there, and that it would be paid:—Held within 7 & 8 Geo. 4, c. 29, s. 53; and the indictment on the pretence that it was a good and genuine order for the payment, and of the value of the sum stated:—Held sufficient. (*Reg.* v. *Parker*, 1838, 2 Mood. C. C. 1).

The certiorari in all indictments for obtaining money by any false pretence is taken away by 7 & 8 Geo. 4, c. 29, s. 53. (*Reg.* v. *Butcher*, M. T. 1840, B. C., 9 D. P. C. 135).

III. RELATIVE TO THE EVIDENCE*.

IV. RELATIVE TO THE PUNISHMENT. See ante, div. I.

False Representation. See tit. *Deceit.*

False Returns. See tits. *Mandamus—Sheriff.*

False Weights. See tits. *Weights and Measures.*

Fee and Fee Simple. See tit. *Tenant in Fee Simple.*

Fees. See tits. *Attorney—Barrister—Money had and received—Proctor—Sheriff.*

Feigned Issue. See tits. *Bankrupt—Interpleader Act.*

Felo de Se.

See also, ante, tit. *Coroner.*

LAMBERT *v.* TAYLOR, E. T. 1825. K. B. 4 *B. & C.* 138.

The Crown may grant the debts or choses in action of a felo de se under the sign manual only.

IN an action by the grantee of the Crown of a debt due on a promissory note, given by defendant to a party found by a coroner's inquest felo de se—

The Court held, 1st, that the second inquisition taken before the sheriff upon the writ of melius inquirendum was an office of instruction only and not of entitling, the title of the owner accruing upon the finding of the coroner, the second therefore need not be produced at the trial; 2ndly, that a debt or chose in action vested in the Crown is assignable at law, and may be granted under the sign manual only; 3rdly, that such debt and security passing to the Crown by the felony, was assignable without indorsement, such assignment taking effect by operation of law, and not by the custom of merchants or other custom; 4thly, supposing it necessary, in order

* Where a false pretence was contained in a false letter, which was lost before the trial, the prisoner was convicted on parol evidence of its contents. (*Rex* v. *Chadwick*, 1833, N. P., 6 C. & P. 181).

to vest the chattels of a felo de se in the Crown, that the inquisition must be found by twelve jurors, it must be taken after verdict to have been so found; and lastly, that a plea, that the note became due and payable in the lifetime of the party, and that the supposed causes of action did not accrue within six years before the exhibiting of the bill, was bad in law, not shewing that he was barred at the time of his death, for, if not so barred, then a right vested in the Crown and was not affected by the statute; the plea also confessing a cause of action and not well avoiding it, the plaintiff held entitled to judgment non obstante veredicto.

Felonies repealed. See 9 *Geo.* 4, *c.* 31.

Fences, Defect of.

POWELL *v.* SALISBURY, T. T. 1828. Ex. 2 *Y. & J.* 391.

Where cattle escape through defect of defendant's fences, he is liable for damage resulting to the cattle from such escape.

THE plaintiff declared in case against the defendant for not repairing his fences, per quod the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a hay-stack.

Per Cur.—In the case of *Holbatch* v. *Warner*, (Cro. Jac. 665), the damage was equally remote as in this case. The objection in that case was, that the obligation to repair was laid in the occupiers. After discussion that case was adjourned; and although two out of three of the Judges were of opinion that the prescription was insufficient, the contrary is now established by a uniform current of decisions, and was so ruled in *Rex* v. *Bucknall* and in *Rider* v. *Smith*, in which *Holbatch* v. *Warner*, and all the cases, are cited and commented upon by Mr. Justice *Buller*. In the case cited from Ventris, 264, upon motion in arrest of judgment, the declaration was held to be good, but no objection like the present was taken. There is no distinction, for the purposes of the action, between the falling of a hay-stack and the drowning of the cattle in a ditch; for by each the death is occasioned. For these reasons the declaration was good in form.

See Cro. Jac. 665.

CARRUTHERS *v.* HOLLIS, E. T. 1838. Q. B. 3 *N. & P.* 246; S. C. 8 *Ad. & E.* 113.

And a party whose fences are defective has no right to drive cattle into the highway.

IN an action of trespass, it appeared that cattle had escaped from an adjoining close into that of the defendant's, through defect of fences which he was bound to repair.

The Court held, he was not justified in driving them out into the highway and leaving them there, although it may be their best way back, and trespass was maintainable.

WINTER *v.* CHARTER, T. T. 1829. Ex. 3 *Y. & J.* 308.

A party who removes a fence

UPON the diversion of a turnpike-road, after the new road had been completed, but before the old road was stopped up, the trus-

is bound to protect the close.

tees, by permission of B., broke down his fence to make a passage from the new road to the close of A., but did not put up a gate or fence to protect the latter close.

The Court held, that the trustees were wrong-doers, and that B. was responsible for their acts.

Ferry.

TROTTER *v.* HARRIS, E. T. 1828. Ex. 2 *Y. & J.* 285.

There is no difference with respect to a claim to an ancient ferry and any other prescriptive claim.

IN an action on the case for the disturbance of a ferry, it appeared that the plaintiff's landlord, and those under whom he claimed, had let the ferry-house for a period of thirty-five years to several tenants, who had with the house occupied the ferry in question, and amongst others to the defendant, who held it from 1813 to 1825, and that during that time only one instance of interruption, and that for a month or two only, had occurred, except by the defendant, who, having been turned out of possession of the ferry in the year 1825, plied for hire close to the ferry, for which an action was brought against him by the plaintiff's landlord, and he suffered judgment by default. For the defendant witnesses were called, who proved interruptions of the ferry at intervals, some seventy-five and some forty years back, some of which were persisted in notwithstanding remonstrances, but others were discontinued. It appeared also, that the toll had been raised from a half-penny to a penny within living memory. Upon these facts, it was contended, that the plaintiff was bound to prove his title to the ferry; which being a flower of the Crown must have existed beyond legal memory, and be bottomed in a royal grant to convey a right to the plaintiff. *Garrow*, B., left the question of possession to the jury, and a verdict was entered for the plaintiff. On a rule to shew cause why that verdict should not be set aside and a new trial had—

Per Cur.—We agree that the commencement of a ferry must be by royal grant or license from the Crown, and that the grant must be shewn, or such evidence of ancient user must be adduced, as will satisfy the jury that it originally had that commencement, although the grant may not be forthcoming. But we can see no difference between this and other ordinary cases of presumption.—Rule discharged.

HUZZEY *v.* FIELD, T. T. 1835. Ex. 2 *C., M. & R.* 432.

An action will lie by the grantee against a party for establishing a new ferry, whether he intended to defraud the grantee or not;

IN case for disturbance of the plaintiff's ferry—

The Court said, a public ferry is a public highway of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. The right of the grantee is, in the one case, an exclusive right of carrying from town to town; in the other, of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers must be injurious; for instance, if any one should construct a new landing place at a short distance from one terminus of the ferry, and make a

practice of carrying passengers over from the other terminus, and then landing them at that place, from which they pass to the same public highway upon which the ferry is established before it reaches any town or vill by which the passengers go immediately to the first, and all the vills and towns to which that highway leads, there could not be any doubt that such an act would be an infringement of the right of the ferry, whether the person so acting intended to defraud the grantee of the ferry or not.

PIM *v.* CURELL, H. T. 1840. Ex. 6 *M. & W.* 234.

IN case for an infringement of a ferry—

The Court held, that the establishment of a ferry and the carrying for hire goods and passengers from a place within the township, and within 400 yards from the plaintiff's ferry, was an infringement.

as within 400 yards.

PETER *v.* KENDAL, E. T. 1827. K. B. 6 *B. & C.* 703.

IN an action on the case by the owner for disturbance of his ferry—

The Court held, first, that it was sufficient to prove possession and enjoyment without producing the court-rolls to prove the origin of the ferry; secondly, that neglect does not, ipso facto, destroy the right to the franchise, although it may be a ground for repealing it by the Crown by scire facias or quo warranto; thirdly, that it is not necessary that the owner of a ferry should have the property in the soil on either side, it is sufficient if he have a right to land, or if the landing place be in a public highway, (overruling the authority in Saville, 11, pl. 29); and lastly, that it was unnecessary for the plaintiff to allege in his declaration the payment of any specific sum for passage money, and it need not therefore be proved.

In an action for disturbance, it is sufficient to prove possession and enjoyment without further proof of title*.

PIM *v.* CURELL, H. T. 1840. Ex. 6 *M. & W.* 234.

IN an action for infringement of a ferry, depositions in a suit in the Duchy Court, made after interlocutory orders for preserving the status quo until a final decision upon the rights of the parties, but no final decree ever made—

The Court held, were inadmissible as evidence of reputation: a judgment upon the matter directly in issue, although between other parties, being evidence, not of any specific fact existing at the time, but of an adjudication of a competent tribunal upon the state of facts and the question of usage at that time; but an interlocutory order of such a nature involved no judgment upon the rights of the parties.

A right of ferry is a matter in which the public are so far interested as to make evidence of reputation admissible.

* In case for disturbance of a ferry, amendments by introducing new counts, laying the new termini as parts of the same ferry, and also varying the persons described as liable to toll, allowed. (*Morris* v. *Evans*, H. T. 1833, Ex., 1 D. P. C. 657). Where the facts alleged to amount to a disturbance of the plaintiff's right were equivocal, and the verdict had been for the defendant, the Court refused a rule to enter it for the plaintiff. (*Huzzey* v. *Field*, T. T. 1835, Ex., 2 C., M. & R. 432; abridged, ante, p. 50).

PETER *v.* KENDAL, E. T. 1827. K. B. 6 *B. & C.* 703.

If a ferry be demised by parol, and the tenant becomes his landlord's servant, it operates as a surrender.

THE owner of a ferry, having by parol demised the same for a year, afterwards made a parol agreement with the tenant to take the profits thereof and allow the tenant so much per day for working the same.

The Court held, 1st, that this by operation of law amounted to a surrender of the interest of the tenant, and restored to the owner the right of action for a disturbance; and 2ndly, in order to sustain such an action, the plaintiff need only prove possession at the time when the cause of action arose, and need not shew that the fare claimed and paid has been always the same; nor that he has any property in the soil on each side of the river: it is sufficient that he has the right to use the land for the purpose of embarking and disembarking his passengers.

Fieri Facias. See tit. *Execution.*

Filiation. See tit. *Bastard.*

Fines of Land*.

See, also, tit. *Recovery.*

I. RELATIVE TO THE THINGS OF WHICH A FINE MIGHT BE LEVIED, OR AN ASSURANCE MADE.

(*a*) BEFORE THE 3 & 4 WILL. 4, c. 74, p. 57.

(*b*) SINCE THE 3 & 4 WILL. 4, c. 74, p. 57.

* By 3 & 4 Will. 4, c. 74, fines and recoveries are abolished, (as to recoveries, see post, tit. *Recovery*), and the "assurance" given by sect. 40 substituted in lieu thereof. An analysis of the 3 & 4 Will. 4 may be useful; and it has been deemed expedient to abridge the leading cases on the subject with a view to litigation arising upon fines passed before the statute 3 & 4 Will. 4, c. 74.

By sect. 1. Meaning of certain words and expressions—"Lands," "Estate," "Base fee," "Estate tail," "Actual tenant in tail," "Tenant in tail," "Tenant in tail entitled to a base fee," "Money," "Person," "Number and gender," "Settlement."

Sect. 2. No fine or recovery to be levied or suffered after the 31st of December, 1833.

Sect. 3. Persons liable after the 31st of December, 1833, to levy fines or suffer recoveries under covenants to effect the purposes intended by means of this act; but in any case where the purpose of a fine or recovery cannot be so effected the persons liable to levy fines or suffer recoveries shall execute a deed which shall have the same operation as the fine or recovery.

Sect. 4. Fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be

II. RELATIVE TO THE PARTIES BY WHOM A FINE MIGHT BE LEVIED, OR AN ASSURANCE MADE.

(*a*) Of the fine before 3 & 4 Will. 4, p. 57.

(*b*) Of the assurance since the 3 & 4 Will. 4, p. 59.

brought, but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

Sect. 5. Fines and recoveries of lands in ancient demesne levied or suffered in the manor court after other fines and recoveries in a superior court, shall be as valid as if the tenure had not been changed. Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

Sect. 6. Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognized within twenty years.

Sect. 7. Fines made valid without amendment.

Sect. 8. Recoveries made valid without amendment.

Sect. 9. Saving jurisdiction in cases not provided for.

Sect. 10. Recoveries made valid in certain cases where bargain and sale is not duly enrolled.

Sect. 11. Recoveries, invalid in consequence of there not being proper writs of entry, made valid in certain cases.

Sect. 12. Certain cases in which fines and recoveries shall not be made valid by this act.

Sect. 13. As to the records of fines and recoveries in the Courts of Common Pleas at Westminster and Lancaster, and the Court of Pleas at Durham, after the 31st of December, 1833.

Sect. 14. Estates tail, and estates expectant thereon, no longer barrable by warranty.

Sect. 15. Power, after the 31st of December, 1833, to dispose of lands entailed in fee simple, or for a less estate, saving the rights of certain persons.

Sect. 16. Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 Hen. 7, c. 20, except with assent.

Sect. 17. Except as to lands in settlements before this act, the act 11 Hen. 7, c. 20, repealed.

Sect. 18. The power of disposition not to extend to certain tenants in tail.

Sect. 19. Power, after the 31st of December, 1833, to enlarge base fees, saving the rights of certain persons.

Sect. 20. Issue inheritable not to bar expectancies.

Sect. 21. Extent of estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

Sect. 22. The owner of the first existing estate under a settlement, prior to an estate tail under the same settlement, to be the protector of the settlement.

Sect. 23. Each of two or more owners of a prior estate to be the sole protector as to his share.

Sect. 24. Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

Sect. 25. As to estates confirmed or restored by settlement.

Sect. 26. As to leases at rent created by settlement.

Sect. 27. No tenant in dower, heir, executor, &c., to be protector, except in the case of a bare trustee.

Sect. 28. Who shall be the protector where the owner of the prior estate shall, by the two last clauses, be excluded.

Sect. 29. Where, in the disposition of an estate, before the 31st of December, 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

Sect. 30. Where in the case of the disposition of a reversion on or before the 31st of December, 1833, the person to make the tenant to the writ of entry in the recovery shall be the protector.

Sect. 31. Where a bare trustee under a settlement made before the passing of this act shall be the protector.

Sect. 32. Power to any settlor to appoint the protector.

III. RELATIVE TO THE ACKNOWLEDGMENT OF A FINE OR ASSURANCE.

(*a*) Of the fine before 3 & 4 Will. 4.

1. *As to the Commissioner*, p. 59.
2. *In England*, p. 60.
3. *In Scotland*, p. 60.
4. *In the Colonies*, p. 60.
5. *In Foreign Countries*, p. 61.
6. *Of the Affidavit*, p. 62.

(*b*) Of the assurance since the 3 & 4 Will. 4, p. 63.

Sect. 33. In cases of lunacy, the Lord Chancellor or Lord Keeper or Lords Commissioners, or other persons intrusted with lunatics, or in cases of treason or felony, &c., the Court of Chancery, to be the protector.

Sect. 34. Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

Sect. 35. Where a base fee, and a protector, his consent requisite to the exercising of a power of disposition.

Sect. 36. The protector to be subject to no control in the exercise of his power of consenting.

Sect. 37. Certain rules of equity not to apply between the protector and a tenant in tail under the same.

Sect. 38. A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

Sect. 39. Base fees, when united with the immediate reversions, enlarged instead of being merged.

Sect. 40. Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and, if a married woman, with her husband's concurrence.

Sect. 41. Every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack-rent, or not less than five-sixths of a rack-rent, to be inoperative unless inrolled in Chancery within six months; 27 Hen. 8, c. 16.

Sect. 42. Consent of the protector to be given by the same assurance, or by a distinct deed.

Sect. 43. If by distinct deed, to be considered unqualified, unless he refer to the assurance.

Sect. 44. Protector not to revoke his consent.

Sect. 45. A married woman protector to consent as a feme sole.

Sect. 46. Consent of a protector by distinct deed void, unless inrolled with or before the assurance.

Sect. 47. Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

Sect. 48. Lord Chancellor, &c., to have power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

Sect. 49. Order of the Lord Chancellor, &c., to be evidence of consent.

Sect. 50. The previous clauses to apply to copyholds, with certain variations.

Sect. 51. As to the deed of consent, and the entry of it in the court rolls, where the protector of a settlement of copyholds consents by deed to the disposition of a tenant in tail.

Sect. 52. As to the consent of a protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls.

Sect. 53. Power to equitable tenants in tail of copyholds to dispose of their lands by deed.

Sect. 54. Inrolment not necessary as to copyholds.

Sect. 55. Repeal of the Bankrupt Act, 6 Geo. 4, c. 16, s. 65, so far as relates to

IV. RELATIVE TO THE PROCLAMATION AND KING'S SILVER BEFORE 3 & 4 Will. 4, p. 65.

V. RELATIVE TO THE PASSING OF A FINE OR ASSURANCE.

(*a*) Of the fine before the 3 & 4 Will. 4, p. 67.

(*b*) Of the assurance since the 3 & 4 Will. 4, p. 67.

VI. RELATIVE TO THE CONSTRUCTION OF A FINE BEFORE 3 & 4 Will. 4, p. 68.

estates tail, but not to extend to lands of a bankrupt under a commission or fiat issued on or before the 31st of December, 1833, nor to revive former acts.

Sect. 56. The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

Sect. 57. Commissioner in case of a tenant in tail entitled to a base fee becoming bankrupt, and of their being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

Sect. 58. As to the consent of the protector in case of bankruptcy.

Sect. 59. As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands, and of the deed of consent.

Sect. 60. Subsequent enlargement of base fees created by the disposition of the commissioner.

Sect. 61. Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

Sect. 62. A voidable estate created in favour of a purchaser by an actual tenant in tail entitled to a base fee becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or, being such, with his consent, or on there ceasing to be a protector, but not against a purchaser, without notice.

Sect. 63. Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

Sect. 64. Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

Sect. 65. The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

Sect. 66. Every disposition by the commissioner of copyhold lands, where the estate shall not be equitable, to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

Sect. 67. Assignees to recover rents of the lands of a bankrupt, of which the commissioner has power to make disposition, and to enforce covenants, as if entitled to the reversion. This clause to apply to all copyhold lands; but, as to other lands, only to such as the commissioner may dispose of after the bankrupt's death.

Sect. 68. All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

Sect. 69. Deeds relating to the lands of bankrupts in Ireland to be inrolled in the Court of Chancery there.

Sect. 70. Repeal of the stat. 7 Geo. 4, c. 45, except as to proceedings commenced before 1st of January, 1834; 39 & 40 Geo. 3, c. 56, not to be revived.

Sect. 71. The previous clause, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

Sect. 72. Lands of any tenure in Ireland to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

Sect. 73. As to deeds being acknowledged before inrolment.

VII. RELATIVE TO THE EFFECT OF A FINE BEFORE THE 3 & 4 WILL. 4, p. 68.

VIII. RELATIVE TO THE EVIDENCE TO EXPLAIN A FINE, AND WHEN A FINE IS EVIDENCE, BEFORE THE 3 & 4 WILL. 4, p. 70.

IX. RELATIVE TO THE AMENDMENT OF A FINE.

(*a*) BEFORE THE 3 & 4 WILL. 4, p. 71.

(*b*) SINCE THE 3 & 4 WILL. 4, p. 72.

Sect. 74. Every deed to be inrolled, by which lands or money shall be disposed of under this act, to take effect as if inrolment not required.

Sect. 75. The Court of Chancery to regulate the fees to be paid for the inrolment of deeds, &c.

Sect. 76. The Court of Common Pleas to regulate the fees for entries on court rolls, and indorsements on deeds, and for taking consents, &c.

Sect. 77. A married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers, as a feme sole. Not to extend to copyholds in certain cases.

Sect. 78. The powers of disposition given to a married woman by this act not to interfere with any other powers.

Sect. 79. Every deed by a married woman, not executed by her as a protector, to be acknowledged by her before a judge, &c.

Sect. 80. The judge, &c., before receiving such acknowledment, to examine her apart from her husband.

Sect. 81. As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivering of copies.

Sect. 82. Powers of perpetual commissioners not confined to any particular place.

Sect. 83. If, from being beyond seas, a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

Sect. 84. When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned, and also sign a certificate of the taking of such acknowledgment to the effect here mentioned.

Sect. 85. Certificate, with affidavit verifying the same, to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the Court.

Sect. 86. On filing certificate, the deed by relation to take effect from time of acknowledgment.

Sect. 87. The officer with whom the certificates are lodged to make an index of the same.

Sect. 88. Officer to deliver a copy of certificate filed, which shall be evidence.

Sect. 89. Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the Courts to make orders touching the examination, memorandums, certificates, affidavits, &c.

Sect. 90. A married woman to be separately examined on the surrender of an equitable estate in copyholds as if such estate were legal.

Sect. 91. Court of Common Pleas, in the case of a husband being lunatic, &c., may dispense with his concurrence, except where the Lord Chancellor, or other persons intrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

Sect. 92. Ireland.

Sect. 93. Act may be altered this session.

I. RELATIVE TO THE THINGS OF WHICH A FINE MIGHT BE LEVIED, OR AN ASSURANCE MADE.

(*a*) Before the 3 & 4 Will. 4, c. 74.

Doe *d.* Young *v.* Sotheron, T. T. 1831. K. B. 2 *B. & Ad.* 628.

A fine may be levied of a cottage eo nomine.

The deed to lead the uses described the premises as a piece or parcel of ground, situate &c., containing &c., "and also of and in all those several messuages, dwelling-houses, tenements, warehouses, shops, coach-houses, and all and singular erections and buildings whatsoever, erected and built and standing, and being in and upon the said piece or parcel of ground," &c. The fine was "of thirty messuages, thirty cottages, thirty gardens, and four acres of land;" at which time there were three cottages and forty-nine dwelling-houses on the land, and at the time of the ejectment the same number of each.

The Court held, that, it being clear that a fine may be levied of a cottage eo nomine, and therefore any number of cottages would satisfy the allegation of a number of dwelling-houses, the fine was sufficient to pass the whole property.

(*b*) Since the 3 & 4 Will. 4*.

II. RELATIVE TO THE PARTIES BY WHOM A FINE MIGHT BE LEVIED†, OR AN ASSURANCE MADE.

(*a*) Of the fine before 3 & 4 Will. 4.

Doe *d.* Lidgbird *v.* Lawson, M. T. 1828. K. B. 8 *B. & C.* 606.

A party not actually in possession cannot be deemed to have been seised at the time of levying a fine.

A., a party levying a fine of Hil. T. 1821, having in the following April distrained for half a year's rent of the premises, due at Lady-day, 1821, and other actions being then pending to try the title of the party, and another as heir-at-law, the rents were paid into a banker's to abide the event; which, being determined in his favour, was ultimately paid over to his representatives.

The Court held, that never having actually received any rent, he was not to be deemed to have been seised at the time of his levying the fine, and, consequently, the fine did not operate as a bar to the ejectment, in which the lessor claimed to be the heir.

* The 3 & 4 Will. 4, c. 74, s. 53, only applies to equitable estates of tenants in tail of lands held by copy of court-roll. The Court therefore refused a mandamus to the lord of a manor, commanding him to enter on the court-rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward of the manor was accustomed to give admittances, signed by him, to the grantee of such hereditaments, but did not inrol the deed by which they were granted. (*Reg.* v. *Lords of the Manor of Ingleton*, T. T. 1840, B. C., 8 D. P. C. 693).

† A warrant, executed by one of several vouchees, in which he was only named, is sufficient. (*Booty* dem., *Cameron* ten., M. T. 1831, C. P., 8 Bing. 18; S. C. 1 M. & Scott, 57; S. C. 1 D. P. C. 241).

DOE *d.* CHRISTMAS *v.* OLIVER, M. T. 1829. K. B. 10 *B. & C.* 181; S. C. 5 *M. & R.* 202.

A devisee in remainder may levy a fine, which will operate by way of estoppel during the continuance of a life estate, and by way of absolute assurance afterwards.

BY devise, testator limited lands to his wife for life, with remainder to such of his brother's children as should be living at the decease of the wife. The brother had but one child, a daughter, who married, and afterwards, during the lifetime of the testator's widow, with her husband levied a fine.

The Court held that it had a double operation: viz. that it bound the husband and wife by estoppel or conclusion so long as the contingency continued; and that, upon the contingency happening, it ceased to create an estate by way of estoppel, but became an interest, and gave the same right as would have been given if the contingency had happened before the fine was levied.

EGREMONT *dem.*, E. T. 1828. C. P. 2 *M. & P.* 265.—S. P. JAMESON *v.* FLETCHER, *Id.* 265, n.; S. P. VALE *vouchee*, E. T. 1828. C. P. 5 *Bing.* 176.

Where one of the vouchees became a lunatic after executing the power of attorney, fine allowed to pass as to the others.

ON motion that a fine might pass, it appeared that one of two vouchees became insane after he had executed a joint warrant of attorney, but before the perfecting of the recovery.

The Court allowed it to pass as to all the parties except him.

MURLEY *v.* SHERREN, H. T. 1839. K. B. 1 *P. & D.* 126.

In a subsequent case, it was held that a fine levied by a lunatic could not be impeached at law, on the ground of fraud practised on the conusor.

IN trespass, it was proved that the land originally belonged to one Edward T. Murley, who conveyed it in 1805 to Templeman, and levied a fine for his use. In July, 1822, Edward T. Murley was found to have been a lunatic for thirty years preceding, upon a commission, and Greenham was appointed his committee. A suit was instituted against Templeman, which was compromised, upon the terms of Templeman retaining one-third of the property, and conveying the residue to Greenham for the lunatic. Deeds were accordingly prepared and executed. The lunatic died February 18, 1838; and the plaintiff claimed as his heir-at-law, Greenham, as his devisee, and also as holding the legal estate under the conveyance from Templeman. The plaintiff proposed to shew that Templeman had fraudulently persuaded the lunatic to convey away his property to him, and that the conveyance from Templeman to Greenham was a fraudulent arrangement to deprive the heirs of Murley of the property. The learned Judge held that the fine in 1808 passed the estate, and that the question of fraud was not open in reference to that instrument, though it might be shewn that Templeman was defrauded by the conveyance in 1828. No such evidence being offered, he nonsuited the plaintiff.

Per Cur.—We are of opinion that the ruling of the learned Judge was perfectly right. We express no opinion as to the relief which a court of equity may be competent to give; but it is of great importance that a court of law should proceed on legal principles, and not be induced to depart from them by any hardship in the particular case. At law, the fine is valid, and nothing has been done to avoid it. The result is, that Templeman was competent to convey a good legal title to Greenham; and no evidence was tendered to shew that, as between these two, he had not done so.

(*b*) Of the assurance since the 3 & 4 Will. 4.

Gill, *Ex parte*, E. T. 1833. C. P. 1 *Bing. N. S.* 268.

In this case it appeared that the husband had become bankrupt, and absconded to America.

The wife, where husband became bankrupt and absconded to America, allowed to pass her interest, under 3 & 4 Will. 4, c. 74.

The Court held that, under 3 & 4 Will. 4, c. 74, ss. 77, 91, a feme covert, when her husband has absconded, and has not been heard of for some time, may pass a contingent life interest in freehold property.

Shirley, *Ex parte*, H. T. 1839. C. P. 7 *D. P. C.* 258; S. C. 5 *Bing. N. S.* 226.

On motion that a conveyance of certain copyhold premises might be made by the applicant Ann Shirley, a married woman, without the concurrence of her husband, under the act 3 & 4 Will. 4, c. 74; the applicant, it appeared, had been married in the month of November, 1816, and in the following year her husband became bankrupt, and quitted England. The wife was devisee.

Under a devise to the wife, where the husband is abroad, separated from her, the Court allowed a conveyance by her under 3 & 4 Will. 4, without his concurrence.

The Court held, that copyhold property may be conveyed by a married woman without the concurrence of her husband, notwithstanding the proviso in the stat. 3 & 4 Will. 4, c. 74, s. 77, as to copyholds.

III. RELATIVE TO THE ACKNOWLEDGMENT OF A FINE OR ASSURANCE.

(*a*) Of the fine before 3 & 4 Will. 4.

1. *As to the Commissioner.*

Reg. Gen., E. T. 1827. C. P. 4 *Bing.* 247.

The Rule of Hil. T. 1827, (4 Bing., C. P., 102), as to a taking acknowledgment before commissioners, revoked; and in future, it is ordered, that one at least of the commissioners shall be a person not concerned as an attorney, agent, &c., of any party thereto; and that in the affidavit of taking such acknowledgment it shall be deposed to that effect, and the name and residence of such commissioner stated in the affidavit; and further, that the commissioners do inquire of married women whether they intend to give up their interests, without any provision made for them in return; and if they find that such provision is to be made, that they shall not take their acknowledgment; and one of the commissioners shall state to that effect, and the answer given to such inquiry; and when no provision is to be made, that the commissioner has no reason to doubt of the truth of her declaration, and verily believes the same to be true; and further, that in future the affidavit of the taking of any acknowledgment shall pursue the exact words of the form annexed to this order, unless otherwise necessary. And, lastly, to

As to commissioners before whom acknowledgment is to be taken*.

* The married woman's acknowledgment must, even in Ireland, be made before a commissioner of the Court. (*Anderson, In re*, 2 Bing. N. S. 435; S. C. 2 Scott, 626).

avoid delay and expense occasioned by any variance in the names of parties, it is further ordered, that the commissioners take care, before signing the caption, that the signatures of the parties correspond with the præcipe and dedimus, and, if any are not correctly stated, to forbear to take the acknowledgment until the writ shall have been amended by the proper officer.

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2. *In England.*

DOE *d.* FLEMING *v.* FORD, T. T. 1834. K. B. 3 *N. & M.* 813; S. C. 1 *Ad. & E.* 758.

The 4 Hen. 7, c. 24, as to the engrossment of the fine antecedent to the proclamation, seems only discretionary.

ON the trial of an action of ejectment, the cause was referred to a barrister, who, upon the face of the award, found that one Robert Stafford, being a disseisor in possession of the premises, levied a fine, the chirograph of which bore date, "In three weeks of the Holy Trinity, 9 Geo. 4," (which was on the 23rd of June); that the first of the four proclamations was made on the 21st of June, in Trinity Term, 9 Geo. 4, (being, in fact, two days subsequent to the date of the chirograph). The arbitrator then decided in favour of the defendants, assuming the fine to be duly levied, and the proclamation thereof to be duly made.

Lord *Denman*.—Can it be said that a fine is to be proclaimed before it has been engrossed? The Court of Common Pleas have put no construction upon the 4 Hen. 7, c. 24; the officers of the Court have acted in that way. *Taunton*, J.—In the reading of Lord Coke on the Statute of Fines, he says, "It is not necessary that a fine should be engrossed, for it is a perfect record before it is engrossed."

CHEEK *plaintiff*, BATH AND OTHERS *deforciants*, T. T. 1833. C. P. 4 *M. & Scott*, 460.

Where husband and wife live separate, her acknowledgment, without the husband's consent, is no ground for setting it aside.

THE acknowledgment of a party to a fine was taken before commissioners, who were aware of the fact of her being a married woman, and of the non-concurrence of her husband; but the parties were living separate, under a deed, by which the husband covenanted not to interfere with his wife's property.

The Court refused to reverse the fine at the instance of the husband, but left him to his common-law remedy.

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3. *In Scotland*.*

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4. *In the Colonies.*

KING *demandant*, GIBSON *deforciant*, M. T. 1831. C. P. 1 *D. P. C.* 236; S. C. 8 *Bing.* 4; S. C. 1 *M. & Scott*, 33.

An acknowledgment of a

ON motion that a fine be allowed to pass, it appeared that the acknowledgment of this fine was taken in Jamaica, upon paper, and

* If parties live in a remote part of Scotland, the Court will allow the fine to be taken before the attorney to the sheriff; (*Hawk's Fine*, T. T. 1829, C. P., 6 Bing. 353); but a fine in Scotland, taken before a person not an advocate or clerk to the signet, not allowed to pass. (*Anon.*, 6 M. & P. 54).

there was a certificate annexed to it, that no parchment could be procured.

fine taken in Jamaica, on paper, allowed to pass.

Tindal, L. C. J.—The rule, that acknowledgments of fines shall be taken upon parchment, is made for their better preservation. There is here a sufficient excuse for not complying with it; and we are satisfied that the paper acknowledgment is authentic. Let the officer make a copy on parchment of the acknowledgment, and annex it, with this rule, to the proceedings. That will make the parties safe.—Rule granted.

MARKHAM *v.* BAYLEY, M. T. 1831. C. P. 1 *D. P. C.* 241; S. C. 8 *Bing.* 18; S. C. 6 *M. & P.* 62.

ONE of the commissioners under the dedimus potestatem omitted to sign his name on the indorsement to the dedimus; the præcipe and concord were duly signed by both commissioners, and the regular affidavit made by one of them. The acknowledgment was taken in the West Indies.

So, a fine taken in the West Indies was allowed to pass, although one of the commissioners omitted to indorse his name on the dedimus.

The Court allowed the fine to pass.

THISTLETHWAYTE *dem.*, MAIDMENT *ten.*, M. T. 1824. C. P. 2 *Bing.* 361; S. C. 9 *Moore*, 664.

THE acknowledgment in this recovery was taken at Meerut, and there was an erasure in the date of which no notice was taken by the magistrate before whom the acknowledgment was made. The erasure, however, only affected an impossible date. Under these circumstances—

But in a fine from India the acknowledgment must notice the date correctly.

The Court refused to let the fine pass.

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5. *In Foreign Countries.*

RIDDELL *plaintiff*, NASH *deforciant*, M. T. 1823. C. P. 8 *Moore*, 632.

THE Court refused to permit the fine to pass where the affidavit of acknowledgment had been taken before the British Consul at C. in France; the mayor there having refused to take it, the proceedings being in English, and it not being shewn that there was no other competent magistrate except the mayor.

A fine cannot pass unless the proper officer abroad has taken it.

BARBER, *In re*, H. T. 1836. C. P. 4 *D. P. C.* 640; 2 *Bing. N. S.* 268; S. C. 2 *Scott*, 436.

ON motion that the officer receive a certificate, it appeared that the conusors of this fine, being resident at Boston, in America, the acknowledgment was taken before special commissioners, and the affidavit sworn before the judge of the municipal court of Boston. This affidavit was authenticated by the British Consul instead of a notary public, in consequence of which the clerk of the inrolments refused to receive the certificate of acknowledgment.

A British Consul at a foreign port may certify the handwriting and authority of the party taking the affidavit of acknowledgment.

The Court, after some consideration, granted the application.

6. *Of the Affidavit.*

By Rule, E. T. 1828. C. P. 4 *Bing.* 750.

Rule, E. T. 1828, regulates the affidavit of acknowledgment.

Rule of Hil. T. 1828, as to affidavits of taking acknowledgments by married women revoked; and it is ordered, that one at least of the commissioners shall be a person not concerned in any way as attorney or agent to the party thereto, and so deposed to in the affidavits; and that the commissioners do inquire as to any provision intended to be made, and being in fact made, before taking the acknowledgment, and so deposed to in the affidavit; and that the affidavit do pursue the form prescribed, and that the commissioners take care that the signatures of the parties correspond with the præcipe and dedimus, and, if any error therein, that the same be amended by the proper officer before the acknowledgment be taken.

Reg. Gen., M. T. 1834. C. P. 4 *M. & Scott,* 749.

Rule, M. T. 1834, regulates the acknowledgment of fines.

By Rule M. T. 1834, it is ordered, that affidavits verifying the certificate of the acknowledgment may be made by other competent persons where the commissioner cannot depose as to the knowledge and age of the party making the acknowledgment; and where more than one feme covert shall acknowledge the same deed, and for the same property, or where one shall acknowledge more than one deed respecting the same property, or there shall be in either case more than one acknowledgment, half fees shall only be taken after the first, and the acknowledgment of a lease and release to be taken and paid for as only one acknowledgment.

Anon., H. T. 1835. C. P. 1 *Scott,* 52.

The affidavit required by the Rule may be filed after filing the certificate.

The Court held, that the affidavit verifying the certificate of the acknowledgment of a married woman, taken by commission, under the 3 & 4 Will. 4, c. 74, s. 83, may be filed subsequently to the filing of the certificate.

Hutchinson, *In re,* T. T. 1827. C. P. 4 *Bing.* 606; S. C. 1 *M. & P.* 559.

The British Consul abroad is incompetent to take the affidavit*.

The Court held, that a British Consul at a foreign port had no authority under stat. 6 Geo. 4, c. 87, s. 20, to administer an oath of the acknowledgment of a party levying a fine.

See Picardo v. *Machado,* 7 *D. & R.* 478; 4 *B. & C.* 886.

Birch, *Ex parte,* E. T. 1838. C. P. 4 *Bing. N. S.* 394; S. C. 6 *Scott,* 185.

The affidavit made abroad, if not usual to be

In this case, the affidavit of execution of the deed by married women in foreign parts was not signed by the parties.

* Affidavit of acknowledgment taken in the Brazils, where it was sworn no parchment could be obtained, allowed. (*Turner* v. *Alzador,* 1 M. & Scott, 24). Where the affidavit was taken abroad on foreign stamped paper, and deposited in a legal custody there, a copy certified and duly authenticated being only transmitted, the fine allowed to pass. (*Wickham* dem., *Foreman* ten., 9 Bing. 332; S. C. 2 M. & Scott, 420; S. C. 1 D. P. C. 352).

The Court allowed it, upon proof that it was not usual for affidavits there to be signed by the deponent.

signed by the deponent, will be received without.

(*b*) Of the assurance since the 3 & 4 Will. 4*.

Reg. Gen., T. T. 1834. C. P.

By Rule, it is ordered, that where the affidavit verifying the certificate of acknowledgment, taken in pursuance of the late act of Parliament respecting fines and recoveries, "state the deponent's knowledge of the party making the acknowledgment, and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

By Rule, T. T. 1834, affidavits under the 3 & 4 Will. 4, c. 74, s. 84, are regulated†.

Reg. Gen., T. T. 1834. C. P.

By Rule, it is ordered, that where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by rule to be taken shall be taken for the first acknowledgment only. And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees; and so, also, where the same married woman shall at the same time acknowledge more than one deed respecting the same property. And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit. In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

And Rule, T. T. 4 Will. 4, regulates the acknowledgment by several.

Luke, *In re*, M. T. 1834. C. P. 3 *D. P. C.* 112; S. C. 1 *Bing. N. S.* 265; S. C. 1 *Scott*, 80.

Sarah Luke became, by the renunciation of others, the sole trustee of certain premises, and it being considered advantageous to the parties interested that the property should be conveyed for the purpose of building, she was directed to convey the same under 1 Will. 4, c. 60, s. 6. The property being situated in Lancaster, the Court of Chancery in the county palatine directed the infant to make the conveyance under the 7th section of the same statute. Previous, however, to the execution of the conveyance, the infant and sole trustee married, and having, upon her appearance before the commissioners, for the purpose of being examined under the 79th and 80th sections of the 3 & 4 Will. 4, c. 74, admitted that

Under the 3 & 4 Will. 4, c. 74, an infant trustee may make an assurance‡.

* The proper name in which to levy a fine is that which the conusor had assumed, and was known by, at the time of levying it, although no royal license or formal authority to change the name had been procured. (*Davies* dem., *Lewes* ten., E. T. 1837, C. P., 5 Scott, 835).

† An acknowledgment taken by a judge at Illinois before a notary public suffices. (*Mann, Ex parte*, E. T. 1839, C. P., 5 Bing. N. S. 226).

‡ Under the 3 & 4 Will. 4, the acknowledgment abroad must shew the wife to be of full age. (*Coverley, In re*, T. T. 1839, C. P., 8 Scott, 147). Where the conusance of two conusors to a fine was taken in India, and the conusance of a third conusor was afterwards taken in this country; the conusee died a few days

she was an infant, not more than seventeen years of age, they refused to take her acknowledgment, under the impression that the 84th section of the same act, which required them to sign a certificate, stating that the party was, at the time of her acknowledging the deed, of full age, &c., created a difficulty which they could not get over; it being, as they conceived, impossible for them to certify that she was of full age in opposition to her own assertion that she was not.

The Court allowed the commissioners to take the acknowledgment of the execution of the deed by the infant married woman, without certifying that she was of full age,

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SHUFFLEBOTTOM, *In re*, M. T. 1838. C. P. 6 *Scott*, 898.

Affidavit of acknowledgment made abroad need not state the place where taken*.

THE acknowledgment was taken abroad. The affidavit verifying the certificate did not state the place where taken.

The Court held it sufficient.

PEARSALL, *In re*, M. T. 1840. C. P. 9 *D. P. C.* 46; S. C. 2 *Scott, N. S.* 188; S. C. 1 *M. & G.* 573.

Where, under 3 & 4 Will. 4, c. 74, the commissioner, in Germany, taking the acknowledgment, refused to make the affidavit:—Held, it might be made by the notary, being of equal rank.

THE married woman lived at Carlsruhe, in Germany, and her acknowledgment was taken before a commissioner, who had declined to make an affidavit, because, being at the head of the department of notaries public, he deemed it to be unbecoming in him, and inconsistent with his position, to make an affidavit before a person who derived his authority from him. One of the notaries public had made the affidavit.

Tindal, C. J.—I think that this is a case in which, if any person not of the particular rank named in the rule of Court can make an affidavit, the notary public is such a person. He is an officer of equal rank and station with a practising attorney, and should receive equal credence.

before the last conusance was taken; and, under the circumstances of the case, the fine was allowed to pass as to the two conusors in India. (*Griffith's fine*, 1 Scott, 711; S. C. 1 Bing. N. S. 721).

* Under 6 Geo. 4, c. 87, s. 20, a British consul has the same power as a notary public to certify that the affidavit in support of a married woman's acknowledgment was sworn before a commissioner duly appointed. (*Barber, In re*, H. T. 1836, C. P., 2 Bing. N. S. 268; S. C. 2 Scott, 436; S. C. 4 Dowl. P. C. 640).

An affidavit of verification of the certificate of the acknowledgment of a married woman under the Fines and Recoveries Act, the parties being resident in Germany, must be sworn before a native court; and an affidavit sworn before the British consul is not sufficient. It is no objection to an affidavit sworn before a native court, that it is originally in the German language, if it is translated, and the translation verified; and the oath may be administered in the German language, if it is translated by an interpreter to the deponent. It is sufficient, that the affidavit should be signed by the judge of the country, and that the deponent's signature should not be attached, the judge's signature being verified, and an affidavit being produced that such is the course of practice in Germany. (*Eady, In re*, E. T. 1838, C. P., 6 D. P. C. 615).

† Since 3 & 4 Will. 4, c. 42, affidavits verifying certificate of acknowledgment by feme coverts, taken in Ireland, must be made before a commissioner of the C. P. (*Anderson's Fine*, T. T. 1835, C. P., 2 Bing. N. S. 431; S. C. 2 Scott, 626). The Court allowed the attorney for taking the acknowledgment, being also one of the commissioners, to verify the certificate. (*Scholefield, In re*, M. T. 1836, C. P., 5 D. P. C. 363).

WILLIAMS, *In re*, M. T. 1840. C. P. 9 *D. P. C.* 72; S. C. 2 *Scott, N. S.* 120.

On a conveyance by the wife of her own property under the 3 & 4 Will. 4, c. 74, s. 91, without the concurrence of her husband, who is abroad and absconded, she must make an affidavit.

IN support of an application for a married woman to be permitted to convey her interest in an estate without the concurrence of her husband, an affidavit was produced, sworn by the sister of the feme covert, who stated, that the person on whose behalf the application was made was speechless.

The Court refused to grant the application without an affidavit that the married woman herself had been examined.

BIRCH, *In re*, E. T. 1838. C. P. 6 *Scott*, 185; S. C. 4 *Bing. N. S.* 394.

If the affidavit be made abroad it need not be signed, if such be the practice of the country where made*.

ON motion for leave to file the certificate of acknowledgment of a deed by two married women, and the affidavit verifying the same under the 3 & 4 Will. 4, c. 74, ss. 84, 85. The parties were resident at Hamburgh, the acknowledgment was taken there, and the certificate verified by an affidavit in the German language, sworn before the prætor but not signed by the deponent; it being sworn, that, by the practice of the country, the affidavit is never signed by the deponent.

The Court allowed the acknowledgment to pass.

GROVE, *Ex parte*, M. T. 1836. C. P. 5 *D. P. C.* 355; S. C. 3 *Scott*, 671; S. C. 3 *Bing. N. S.* 304.

The commissioners have a lien for their fees.

ON the question, whether the commissioners for taking acknowledgments of married women have a lien on the instruments in their possession for the fees due in respect of the discharge of their duty.

Per Cur.—It is perfectly clear, that the two gentlemen who were appointed commissioners for taking these acknowledgments had a right to receive their fees, and also to a lien upon the deeds until the fees were paid.

IV. RELATIVE TO THE PROCLAMATION AND KING'S SILVER BEFORE 3 & 4 WILL. IV.

EVANS *demandant*, DAVIES & WIFE *deforciants*, H. T. 1839. C. P. 7 *D. P. C.* 259; S. C. 5 *Bing. N. S.* 229.

The omission to indorse proclamations† on a fine may be

A FINE having been levied at the Autumn Great Session in Wales, in 1830, and no indorsement appearing on the record of any proclamation, evidence being given that it was the practice to proclaim all

* The Court refused to file the certificate of the acknowledgment of a deed by a married woman, resident in America, verified by an affidavit made before a notary public, without an affidavit that notaries public are the proper officers for taking affidavits in America; and also as to the identity of the commissioners. (*Mann, Ex parte*, 7 Scott, 142; S.C. 5 Bing. N. S. 226).

† An entry to avoid a fine with proclamations, though not authorized by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment being subsequently founded on it. (*Doe* d. *Blight* v. *Pett*, 11 Ad. & E. 842; S. C. 4 P. & D. 278).

aided by amendment, when it appears that they are always made, whether required or not.

fines at the same session at which they were acknowledged, and at two succeeding sessions; and it appearing by the 11 Geo. 4 & 1 Will. 4, c. 70, s. 28, the subsequent proclamations were required to be at the two succeeding assizes for the same county, the Court upon affidavit of the third proclamation having been made at the Autumn assizes, 1831, directed the then proclamations to be indorsed on the roll by the clerk of the peace, into whose hands the record had passed on the death of the prothonotary of the Court of Great Session, the fine being on the proper roll, although there was no proof of the second proclamation having been made at the Spring assizes.

LLOYD *demandant*, NICHOLAS *deforciant*, T. T. 1838. C. P. 4 *Bing. N. S.* 633; S. C. 6 *Scott*, 355.

And where entry of proclamations actually made is omitted by the clerk of the Court, they may be by motion and rule indorsed*.

UPON referring to the roll of fines levied at the Great Sessions at Carmarthen, it was found that minutes of the proclamations of the said roll of fines had not been duly indorsed upon the roll, with the exception of the second; and it appeared from affidavits that the proclamations were duly made, and that the want of the indorsement of the first and third was occasioned by the error of the officer.

The Court ordered the proclamations to be duly indorsed, and such proceedings to be taken as should make the fine perfect. Where an error in the recording of proceedings arises from the misprision of the clerk or officer of the Court, the Court will allow an amendment to be made, and will not permit the party to suffer in consequence of the mistake.

ASH AND WATTS *conusors*, GYE *conusee*, M. T. 1829. C. P. 6 *Bing.* 275; S. C. 3 *M. & P.* 602.

Where an attorney's clerk had absconded unknown with the king's silver, and nothing else to complete the fine remained, the Court upon consent allowed it to be paid.

IN 1803, Mr. Ash married Miss Watts. Mrs. Ash and her sister, Mary Watts, were possessed of estates in the counties of Gloucester and Wilts. By indenture of marriage settlement, Mrs. Ash and Mary Watts settled this property on Mr. Ash for life, remainder to his wife for life, remainder to the children of the marriage, in such proportions as they, Mrs. Ash and her sister, should appoint, pursuant to a power reserved by the deed. In Trinity Term, 1807, a fine was levied to enure to the uses of the settlement. This fine proceeded as far as the allocatur; and the king's silver was compounded for and the money given by the attorney to his clerk, that it might be paid and the fine passed, but the clerk absconding with the money the fine was not completed; of which fact the parties remained ignorant until within a few days of the then term. Mrs. Ash and Lucy Watts made appointments in favour of Mr. Ash's children, and were both since dead.

The Court permitted a fine to pass as of Trinity Term, 1807, on payment of the king's silver.

* Where the fine being levied at the Great Sessions, the indorsement of the proclamations was headed "according to the form of the statute:"—Held, that the omission afterwards to state the place where the sessions were holden was immaterial. (*Doe* d. *Jones* v. *Harrison*, K. B., 3 B. & Ad. 764).

V. RELATIVE TO THE PASSING OF THE FINE OR ASSURANCE.

(*a*) Of the fine before 3 & 4 Will. 4.

HOOPER *demandant*, GREEN *deforciant*, T. T. 1830, C. P. 4 *M. & P.* 521.

The Court refused to allow the fine to pass where the papers had been lost before the fine reached the chirographer's office.

THE Court refused to allow a fine to be perfected where, through the negligence of the clerk of the attorney to whom it had been intrusted, the papers had been mislaid before the fine had reached the chirographer's office.

GREENOUGH *demandant*, SCOTT *deforciant*, T. T. 1828. C. P. 12 *Moore*, 302; S. C. 4 *Bing.* 104.

So, a misnomer of one of conusors will prevent the fine from passing*.

IN the dedimus the conusors were named Scott, but they signed their names on the acknowledgment as Scoot.

The Court refused to pass the fine, though there was an affidavit of identity by the conusors' agent, and that they had signed their names Scoot by mistake.

BALL *conusor*, STEPHENS AND WIFE *conusees*, M. T. 1830. C. P. 3 *M. & P.* 742.

And after lapse of more than twelve months, and death of one of the conusors, fine not allowed to pass†.

MORE than twelve months had elapsed after the taking of the acknowledgment of the conusors, and one of them had died.

The Court would not allow the fine to pass, unless it were shewn that the heir at law, or person beneficially interested, assented to the application.

ELTON *plaintiff*, YATEMAN *deforciant*, H. T. 1834. C. P. 2 *M. & Scott*, 1.

But if, through dishonesty of clerk employed, necessary proceedings to complete a fine in time have not been taken, the Court will permit it to pass afterwards.

ON motion that a fine might pass, it appeared that, through the fraud of an attorney's clerk, a fine had not been duly perfected, the fee at the chirographer's office not having been paid.

The Court, on payment of the fee, allowed the fine to pass as of the term in which it would, but for that circumstance, have passed.

(*b*) Of the assurance since the 3 & 4 Will. 4.

THOMAS, *Ex parte*, E. T. 1834. C. P. 4 *M. & Scott*, 331.—S. P. SHUTTLEWORTH, *Ex parte*, E. T. 1834. C. P. 4 *M. & Scott*, 331.

A rule for a wife separated from her husband to make a conveyance of her estate un-

THIS was an application under the 91st section of the 3 & 4 Will. 4, c. 74, that the wife might be at liberty to make a disposition by deed of certain lands and tenements in the counties of Anglesea and Carnarvon, to which she was entitled as tenant in tail in possession, the fee in remainder also in herself, and that the con-

* But allowed to pass where a mistake in the Christian name of one of sixteen conusors, though not discovered until after execution. (*Parker* v. *Parker*, M. T. 1826, C. P., 4 Bing. 79; S. C. 12 Moore, 256).

† A fine was allowed to pass as to conusors in India, although the conusee had died. (*Griffith's Fine*, M. T. 1834, 1 Bing. N. S. 724; S. C. 1 Scott, 711).

der 3 & 4 Will. 4, c. 74, s. 91, is absolute in the first instance.

currence of her husband, Owen Thomas, be dispensed with, he being a lunatic, and found to be so by a commission. She had lived separate from him for twenty-four years.

The Court granted a rule absolute in the first instance.

VI. RELATIVE TO THE CONSTRUCTION OF A FINE BEFORE 3 & 4 Will. 4.

Davies *v.* Bush, H. T. 1824. Ex. 1 *M'Clel. & Y.* 58.

A fine and the deed to lead to uses are to be taken as one assurance.

Under a settlement, the husband was tenant for life, remainder to trustees to preserve &c., remainder to the wife for life, remaindee to trustees &c., remainder to the children of the marriage, remainder to the survivor of husband and wife in fee; afterwards, there being no issue, husband and wife, by lease and release, conveyed the lands in fee to a mortgagee, with a covenant to levy a fine come ceo &c., to enure to the mortgagee during the lives of the mortgagors and the survivor, remainder to the uses, estates, &c., limited by the settlement in favour of the children, &c., to the end that all and every of such leases might be corroborated, &c.; the fine was accordingly levied, and the mortgage having been paid off, the mortgagee reconveyed the premises to the trustees to hold to the uses of the original settlement.

The Court held—first, that the fine and the deed to lead, &c., were to be taken as one assurance, and that the legal effect of the former was limited by the lawful intention of the parties apparent on the face of the deed—viz. to give merely a charge by way of security to the mortgagee on the parties' own interests, and that the interest of the mortgagee depended on the estoppel, which was extinguished by the reconveyance; secondly, that, if the fine had determined the life estates, the contingent remainders were supported by the remainders to trustees, without an actual entry; thirdly, that, on the death of the wife without issue, the husband became entitled, as by virtue of the original settlement, to the fee, and which he might dispose of by will.

VII. RELATIVE TO THE EFFECT OF A FINE BEFORE 3 & 4 Will. 4.

Runcorn *v.* Doe *d.* Cooper, T. T. 1826. K. B. 5 *B. & C.* 696; S. C. 8 *D. & R.* 450.

A fine is not conclusive in favour of a party unless he has a freehold interest.

The question, whether the person levying the fine had or had not such an interest in a churchyard at the time as to render the fine operative, was a point for the consideration of the jury.

The Court was of opinion, that the direction to the jury was incorrect. The fine was inoperative, unless the party suffering it had a freehold interest, by right or by wrong, at the time he did so; even if the jury had returned an answer precisely in form as to the possession, shewing that it was of twenty years' continuance before

the day of the demise in the declaration, and was also an adverse possession against the same vicar, still it might have been difficult to maintain the direction to the jury in point of law, they having said that the right was in the vicar. Twenty years' possession was not evidence of right in all cases against a succeeding rector or vicar who had suffered it. But, upon the ground that the fine was not conclusive, unless there was a freehold interest rightly or wrongly acquired at the time of the passing the fine, and that this was not so presented to the jury, they ordered the judgment to be reversed, and a venire de novo awarded.

DAVIES *dem.*, LOWNDES *ten.*, M. T. 1838. C. P. 6 *Scott*, 738; S. C. 5 *Bing. N. S.* 161.

THE tenant having been appointed and acted as receiver during ten years, in which he also claimed title as devisee against the heir general of the testator, and, upon the final decree in his favour, had received the accruing rents, and openly taken possession, and immediately, in compliance with the directions of the will, assumed the name of the testator, and shortly after levied a fine in that name.

A fine levied by a party in possession taking under a doubtful devise will be a bar to a subsequent demandant.

The Court held, that it was a sufficient claim of the freehold; and a levy of the fine in the name by which then known was sufficient to make the fine available, and a bar to the claim of a subsequent demandant.

DOE *v.* GATACRE, T. T. 1839. C. P. 5 *Bing. N. S.* 609; S. C. 7 *Scott*, 807.

IN ejectment—

The Court held, that a common recovery, suffered by a base tenant for life, with double voucher, destroys the particular estate, and bars all contingent remainders dependent thereon; stat. 14 Eliz. c. 8, being passed, not for the purpose of making such recovery merely null, but for extending the provisions of 32 Hen. 8 to cases where the tenant for life comes in as vouchee, and vouches over to warranty, that is, when he suffers a common recovery, with a double voucher, as well as to the case where the action is against him in the first instance, as tenant to the præcipe, and he vouches over, that is, when he suffers a common recovery with a single voucher.

So, a fine passed by a base tenant for life is a bar to all contingent remainders dependent on the estate.

DOE *d.* COOPER *v.* FINCH, M. T. 1832. K. B. 1 *N. & M.* 130; S. C. 4 *B. & Ad.* 283.

BY marriage settlement certain lands, &c., were settled to the use of A., (the settlor for life), with remainder to trustees to preserve contingent remainders, with remainder to the use of the wife of the settlor for life, with remainder to trustees for 500 years to raise portions for younger children, with remainder to the first and other sons of the settlor successively in tail male.

A fine levied by tenant in tail under a settlement (which also created a term of years) displaces the remainders, and is capable of being devised.

The Court held, that, notwithstanding the outstanding term, the first son, upon his father's death, became tenant in tail in possession of the estate tail, and that, consequently, a fine levied by him worked a discontinuance of the estate tail, and divested the remainders.

DOE *d.* THOMAS *v.* JONES, T. T. 1831. Ex. 1 *C. & J.* 528; S. C. 1 *Tyrw.* 506.

So, the heir at law claiming through the conusor is estopped from impeaching the fine*.

THE father of the lessor of plaintiff, being tenant in tail after a life estate in A. and B., before he came into possession levied a fine come ceo, &c. without proclamations, but with the usual clause of warranty, and survived A. and B., and died, leaving the lessor his issue in tail—

The Court held, that, being privy to and claiming as heir through the tail as conusor, he was estopped from saying that there was not a proper seisin at the time of the fine being levied, and that by the effect of the warranty the right of the issue in tail was taken away.

DOE *d.* GILBERT *v.* ROSS, T. T. 1840. Ex. 7 *M. & W.* 102.

A fine may create a discontinuance.

BY a will in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint, and in default of appointment remainder to the heirs of his body, with remainders over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue. In an ejectment by the lessors of the plaintiff claiming as heirs at law of A. G. M.—

The Court held, that the fine created a discontinuance and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remainder-men only capable of being enforced by real action.

VIII. RELATIVE TO THE EVIDENCE TO EXPLAIN A FINE, AND WHEN A FINE IS EVIDENCE BEFORE 3 & 4 WILL. IV.

DEAN *v.* WELFORD, H. T. 1827. K. B. 8 *D. & R.* 549; S. C. 2 *C. & P.* 173.

Parol evidence is admissible to shew the number of houses of which the conusor was seised.

TESTATOR, being possessed of lands and premises in the parish of C., whereon nineteen tenements had been erected, devised all his lands, &c. to his wife in fee, and afterwards levied a fine of twelve messuages, twelve gardens, twenty acres of meadow, &c. In ejectment by the testator's heir, it appeared that there were nineteen houses on the land according to the plan; it was contended that this was such an ambiguity as to let in parol evidence what part of the property was meant to be included.

The Court held, first, that parol evidence, as to the number of messuages of which the conusor was seised in C. at the time of levying the fine, was admissible; and secondly, that the fine would not pass more than the twelve messuages therein mentioned, and it was therefore competent to shew by parol evidence which were intended.

* Devise of lands to A. for life, remainder to the children of B. living at the time of A.'s death. B. left one daughter, who, with her husband, in the lifetime of A. levied a fine to the use of C. The fine operates by estoppel only during the life of A., but after A.'s death it operates upon the estate, vesting the right of possession in C. (*Doe* d. *Christmas* v. *Oliver*, 5 M. & R. 202).

DOE *d.* GILBERT *v.* ROSS, T. T. 1830. Ex. 7 *M. & W.* 102.

AN examined copy of the record of a fine was produced in evidence. An examined copy of the record of a fine is evidence.

The Court held, 1st, that it was as good evidence of the fine as the chirograph would have been, certified by the officer of the Court; 2nd, that a fine being proved to have been levied in 1790, and a conveyance by the conusor of the fine to a purchaser, stating the fine to have been levied to the use of himself in fee, produced without objection to its being received in evidence, it was good evidence as a declaration of uses of the fine, although not proved that the party derived title under the conusors.

IX. RELATIVE TO THE AMENDMENT OF A FINE.

(*a*) BEFORE 3 & 4 WILL. 4.

BUTT *demandant*, NOEL *deforciant*, E. T. 1830. C. P. 7 *Bing.* 338; S. C. 5 *M. & P.* 159.

THE Court said, that parties might insist on having the indentures of fine made to agree with the concord, by the insertion of all limitations of legal estates contained in the concord. Indentures amended and made according to concord*.

LLOYD *plaintiff*, SIMMONS *deforciant*, M. T. 1824. C. P. 9 *Moore*, 740.

THE Court said, a fine may be amended by erasing the name of one parish, and substituting another in its stead, in order to make it conformable to the deed to lead the uses. Amendment allowed, by erasing one parish and inserting another.

FLOOD *dem.*, SIMONS *ten.*, M. T. 1824. C. P. 2 *Bing.* 386.

THE fine was levied in 1768; and in the deed to lead the uses the property was described as four-fifths of certain premises in the parish of Eynsford. In the fine, it was described to be in Dartford, which is a few miles distant from Eynsford. A misdescription of locality in the deed, as compared with the fine, may be amended†.

The Court, on motion, permitted the word Dartford to be erased, and the word Eynsford to be substituted for it on the fine.

* Amendment allowed of a defendant, from Maria to Mary Ann, (*Woolley* plaintiff, *Harrison* deforciant, T. T. 1825, C. P., 8 Moore, 449); and Ellen from Eleanor suffices, if the party has been known by the former name. (*Hext* deforciant, M. T. 1824, C. P., 7 Moore, 15). So, fine amended, by inserting substituted trustee. (*Jackson* dem., *Wood* ten., E. T. 1832, C. P., 9 Bing. 399; S. C. 2 M. & Scott, 566).

† Where parcels are transposed by mistake, amendment allowed. (*Banbury* plaintiff, *Harper* deforciant, M. T. 1833, C. P., 3 M. & Scott, 101). Where the words were large enough to include the lands in question, and therefore cured by the 3 & 4 Will. 4, c. 74, s. 8, the Court refused to amend an old recovery. (*Evans* v. *Vauchee*, H. T. 1840, C. P., 2 Scott, N. S., 83). Parish omitted, allowed to be inserted. (*Pring* deforciant, M. T. 1824, C. P., 7 Moore, 163; S. P. *Hawker* deforciant, T. T. 1829, C. P., 11 Moore, 435). So, an amendment, by altering the name of the parish, where the mistake had been occasioned by the original parish having been separated into two by act of Parliament. (*Kinderly* plaintiff, *Robinson* deforciant, H. T. 1825, C. P., 7 Moore, 334).

(*b*) Since the 3 & 4 Will. 4.

Lockington *dem.*, Shipley *ten.*, M. T. 1834. C. P. 1 *Bing. N. S.* 355; S. C. 1 *Scott*, 263.

No amendment required where the misdescription is cured by the 3 & 4 Will. 4. c. 74*.

The deed to declare the uses in a fine stated the lands to be situated in the parish of Isham, whilst the fine described them as in the parish of Barton Latimer. Upon application to the Court for leave to amend such misdescription in the fine—

The Court held, that it was provided for in the 7th sect. of 3 & 4 Will. 4, c. 74, and, consequently, that the application was unnecessary.

Fines for Offences.

Morgan *v.* Brown, H. T. 1836. K. B. 6 *N. & M.* 57.

A joint fine of two defendants for an assault is bad; and an action will lie against the justices.

In answer to an action of trespass, the defendants relied upon a conviction under 9 Geo. 4, c. 31, which convicted the plaintiff and another party of an assault, and ordered the two to forfeit and pay the sum of 4*s*.

Lord *Denman*, C. J.—The defendants in this case justify imprisoning the plaintiff upon a conviction under 9 Geo. 4, c. 31; and unless that conviction be bad, there is no doubt that the defendants were justified; but I must own that I think that it is bad. It may be an award that each shall pay the whole sum of 4*s*., or that they shall both pay that sum jointly; but a party who is convicted and fined has a right to know clearly and distinctly what sum he has to pay in order to relieve himself from imprisonment. Each of the parties was guilty in law of a separate offence, and the intention may have been that each should pay half of the fine imposed, and yet either of the parties who might be ready to pay his portion of the fine, and have paid it, might be still kept in prison till the other had paid his portion; and that inconvenience cannot be avoided, unless each has a distinct notice of the sum to be paid by him. Hawkins lays down that a joint fine is erroneous, and refers to a case in 11 Coke's Rep.

Fire Insurance. See tit. *Insurance.*

First Fruits. See tit. *Tithes.*

* The Court amended a fine levied at the Carmarthen Great Sessions in 1830, by indorsing the first and third proclamations, of which there was no entry, it appearing that such proclamations had been made, but the entry of them omitted by the clerk of the court. (*Lloyd* demandant, *Nicholes* deforciant, 1837, C. P., 4 Bing. N. S. 633). And amendment allowed, by inserting another parish, into which some of the lands extended, the omission appearing only in the affidavit. (*Totten* demandant, *Vincent* deforciant, 5 Bing. N. S. 626; S. C. 7 Scott, 835).

Fish and Fishery.

See, also, 7 & 8 Geo. 4, c. 27.

MAYOR OF MALDON *v.* WOOLVET, T. T. 1840. Q. B. 4 *P. & D.* 26.

Oyster-spat is within the prohibition of the 13 Ric. 2, st. 1, c. 19*.

IN an action of trespass for breaking &c., it appeared that the plaintiff's close, in which &c., was a public navigable river; plea, justifying the taking, under a public right of fishing and dredging for oysters and oyster-spat; replication, that oyster-spat was unfit food; rejoinder, that the public had a right of fishery for oyster-spat in a public river. On demurrer—

The Court held the rejoinder bad, oyster-spat being in the nature of spawn, and within the prohibition of 13 Ric. 2, st. 1, c. 19.

DUKE OF SOMERSET *v.* FOGWELL, T. T. 1826. K. B. 5 *B. & C.* 875.

A fishery lying only in grant, an agreement not under seal cannot operate as a demise†.

THE plaintiff was possessed of a fishery in a navigable tide, now in the nature of a royal franchise; and from ancient fines, one as far back as Edw. 6, there was evidence from which its existence, beyond legal memory, might be presumed; but, from the language thereof, that the grantee had nothing more than a fishery, without the property in the soil or water.

The Court held, that being an incorporeal hereditament, and lying in grant, an agreement not under seal could not operate as a demise, and that nothing passed by the agreement. The right, therefore, remaining in the owner, he might maintain trespass against a party taking fish within the limits of the fishery.

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* The deputy oyster-meters of London have by custom the exclusive right, by themselves or their servants, of shovelling, unloading, and delivering all oysters brought in any boat or vessel along the river Thames for sale to every place throughout the port of London, and to have reasonable compensation for so doing; and it was found, by the jury, that 8*s.* a score for the first 100 bushels (double measure), and 4*s.* a score for the remainder of the cargo, was a reasonable compensation for this service. If the deputy meters do not provide sufficient men for the purpose, they are liable to an action, and the parties may have the work done by other persons. For the payment above stated, the deputy meters are bound to do all the labour of shovelling, &c.; and the money paid by the buyers of oysters to the person who actually measures them is a gratuity only. (*Layburn* v. *Crisp*, T. T. 1838, N. P., 8 C. & P. 397). See 16 M. & R. 877.

A whale which has been struck held to be, by the custom of the Greenland trade, a fast fish, although the harpoon becomes detached, if the fish remains so far entangled in the rope of the first striker that there is a reasonable expectation of securing it. (*Hogarth* v. *Jackson*, 1827, N. P., 1 M. & M. 58, and 2 C. & P. 595). So, if the harpoon is detached by the unnecessary and unsolicited interference of the second striker. (*Skinner* v. *Chapman*, 1827, N. P., 1 M. & M. 59).

† The presumption, that the owner of a several fishery is the owner of the soil, is only where the terms of the grant under which he claims are unknown. (*Duke of Somerset* v. *Fogwell*, M. T. 1826, K. B., 5 B. & C. 875).

Fixtures*.

See tits. *Distress—Execution—Mortgage.*

AVERY *v.* CHESSLYN, T. T. 1835. K. B. 5 *N. & M.* 372; S. C. 3 *Ad. & E.* 75.

It is a proper test, as to whether chattels are fixtures or not, whether they can be removed or not without substantial injury to the freehold†.

To an action of trespass by lessor against lessee, for removing a cornice fixed to the freehold; plea, that the cornice was of wood, was put up by the defendant, was fixed by screws only, was for ornament, and that it was carefully removed during the term, and that all injury was amended. Replication, that the cornice was not removable by law. *Coleridge*, J., in summing up to the jury, told them that the question was, whether the cornice was for ornament, and whether it was removable without injury to the freehold; and he observed strongly upon the fact, that in the actual removal no material injury to the freehold had been done. The jury found their verdict for the plaintiff. On motion for a new trial—

Per Cur.—The direction was perfectly right. The question, whether a substantial injury was done to the freehold in removing, was put rather as a test.—Rule refused.

GRYMES *v.* BOWEREN, H. T. 1830. C. P. 6 *Bing.* 437; S. C. 4 *M. & P.* 143.

A pump slightly affixed may be removed by the tenant‡.

THIS was an action on the case for an injury to the plaintiff's reversionary interest by the removal of a pump. It appeared that, in Michaelmas, 1820, the defendant became tenant to the plaintiff of a cottage, and that, at the end of the first year of the tenancy, there

* By the 7 & 8 Geo. 4, it is enacted, "That if any person shall steal, or rip, or cut, or break, with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street or other like place, it shall not be necessary to allege the same to be the property of any person." By the stat. 7 & 8 Geo. 4, c. 27, the stat. 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68, are wholly repealed.

† The word "fixtures" does not necessarily mean things fixed to the realty; and therefore, in an action of trover for goods, chattels, and fixtures, where damages were assessed generally on the whole declaration:—Held, that it must be intended, after verdict, that the jury had not awarded damages in respect of fixtures attached to the freehold. (*Skeen* v. *Richie*, 5 M. & W. 175).

‡ So, an outgoing tenant may remove an ornamental chimney-piece put up by himself during his tenancy, but not a chimney-piece which is not ornamental. An outgoing tenant has no right to remove pillars of brick and mortar built on a dairy floor to hold pans, although such pillars are not let into the ground. (*Leach* v. *Thomas*, 1835, N. P., 7 C. & P. 327).

The right of a tenant to remove tenant's fixtures continues only during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant. Where, therefore, the term, pursuant to a proviso in the lease, was forfeited by the bankruptcy of the lessee, and the lessor entered upon the premises, in order to enforce the forfeiture, and three weeks afterwards the assignees of the lessee still continuing in possession removed and sold a fixture put up by the lessee for the purposes of trade, and the jury found that it was not removed within a reasonable time after

being on the premises a well from which the water had been used to be drawn by a bucket, the tenant, for the more convenient use of the well, arched it over, and erected a pump. The pump being fastened to a board resting on the ground, and fixed to a wall by means of a screw-bolt, which passed through the wall, and through a hole in the board, to which it was attached by a nut, the board being three or four inches from the wall, and the tube passing through the crown of the well. The tenancy was determined at Michaelmas, 1828, by a notice to quit. The tenant removed the pump, in doing which it appeared that some bricks were displaced from the crown of the well, but the wall was not disturbed, the bolt was left in it, the nut only being unscrewed, and the board to which the pump was fixed withdrawn.

Garrow, B., left it to the jury to say, whether this was not a fixture; and he told them that this pump could not have been the subject of a larceny at common law, and that they were bound to give the plaintiff some damages.

But the Court granted a new trial, being of opinion that this pump was removable by the tenant.

WANSBROUGH *v.* MATON, E. T. 1836. K. B. 6 *N. & M.* 367; S. C. 4 *Ad. & E.* 884.

A BARN, called a staddle barn, of wood erected on blocks of stone, some of which stood on the surface, and others on a foundation of brick and mortar, the whole of which could be removed without injury to the caps, which were affixed to the blocks by mortar.

So, a wooden barn resting by its own weight may be removed;

The Court held it not a fixture to which the landlord was entitled.

EMPSON *v.* SODEN, E. T. 1832. K. B. 1 *N. & M.* 720; S. C. 4 *B. & Ad.* 655.

TENANT for years of a house and garden planted some box as a border to a walk, and, previously to the expiration of the tenancy, sold the box to the plaintiff, who, after the expiration of the tenancy, entered the garden for the purpose of taking up the box, and dug some plants, which he was prevented from carrying away by the incoming tenant, one of the defendants. In trover for the box and plants—

but box planted by a tenant in a garden,

Denman, C. J., nonsuited the plaintiff; and, on motion to set the nonsuit aside, the Court refused the rule.

EARL OF MANSFIELD *v.* BLACKBORNE, E. T. 1840. C. P. 8 *Scott*, 720; S. C. 6 *Bing. N. S.* 427.

THE plaintiff demised salt-springs to the defendant, who was to erect salt-works on the premises, and pay a rent in proportion to the number of works erected. The defendant covenanted to leave the works in good repair at the end of the term.

or salt pans, cannot be removed.

the entry of the lessor:—Held, that they had no right so to remove it, and that the lessor might recover it in trover; and semble, such would have been the case even without such finding of the jury. (*Weeton* v. *Woodcock*, T. T. 1840, Ex., 7 M. & W. 14).

The Court held, that iron salt-pans, placed by the defendant on a frame of brick, and used in the boiling of salt, were parcel of such works, and that the defendant was not entitled to remove them.

MARSHALL *v.* LLOYD, E. T. 1838. Ex. 2 *M. & W.* 450.

Where premises are recovered in ejectment, under a clause of re-entry, steam engines, &c., pass to the lessor.

IN 1824, A. leased to B. for twenty-one years a colliery, (with the right of putting up steam-engines, &c., for working it), subject to a proviso for re-entry on non-payment of rent or insolvency. B. erected on the colliery several steam-engines, affixed in the ordinary way to the soil; and afterwards, in 1827, assigned the colliery, with the engines, implements, &c., in use upon it, to trustees in trust to permit B. to enjoy them until default in payment of an annuity granted by him, and on such default to take possession, and sell them, and pay the arrears. In June, 1829, A. recovered possession of the premises in ejectment, brought in pursuance of the proviso for re-entry. In November, 1829, the engines and other articles on the colliery were seized under a fi. fa. at the suit of an execution creditor of B.

The Court held, that the steam-engines passed to the landlord on the re-entry, and that the trustees could not recover them in trover against the sheriff; held also, that the omission of the trustees to take possession on B.'s default in payment of the annuity did avoid the assignment.

GREGG *v.* WELLS, E. T. 1839. Q. B. 10 *Ad. & E.* 90; S. C. 2 *P. & D.* 296.

Where the owner of fixtures allowed them in his presence to be represented as belonging to another:—Held, that he could not maintain an action against the purchaser.

IN trover, the question was, whether the owner of goods, who delivered them into the possession of another person, and by his negligence or misconduct enabled that person to appear to be the true owner, and to deal with them as his own, could recover the value in trover against a bonâ fide purchaser, who had made every prudent and proper inquiry previous to his purchase.

Per Cur.—We are of opinion, that this case comes within the rule laid down in *Pickard* v. *Sears*, (6 Ad. & E. 469), that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

MACKINTOSH *v.* TROTTER, H. T. 1838. Ex. 3 *M. & W.* 184.

A lessee cannot maintain trover for fixtures.

TROVER. Pleas—first, not guilty; secondly, a justification in selling the property in the declaration by order of the assignees under a fiat of bankruptcy against the plaintiff. It appeared that the plaintiff was tenant of the premises in which the property had been seized. It was proved that the fixtures were fixed furniture, not removed at the time of the seizure. The plaintiff had a verdict for the value of the goods and chattels and the fixtures.

Parke, B.—This subject was much considered by my Brother *Alderson* and myself in *Marshall* v. *Lloyd*, (2 M. & W. 450, supra), and this case is within that decision. It was there contended by counsel, that fixtures were not goods and chattels at all, and could

not be recovered in an action of trover. I see no reason to doubt that the Court came to a correct decision in that case. The Court decided, that the principle of law is quicquid solo plantatur solo cedit. The right of the tenant is to remove while he is in, and so convert the fixtures into personal chattels.

HALLEN *v.* RUNDER, T. T. 1834. Ex. 1 *C., M. & R.* 266.

"Fixtures" cannot be recovered under the word "goods."

AN outgoing tenant, who had paid a former tenant for fixtures, which he was entitled to remove during his tenancy, agreed, a few days before his tenancy expired, at the request of his landlady, not to remove the fixtures, she engaging to take them at a valuation, to be made by two brokers. At the expiration of the tenancy the tenant delivered up possession, leaving the fixtures in the house, which were valued on the following day at 40*l.* 10*s.* by two brokers, who signed the appraisement. In indebitatus assumpsit for the price and value of goods, chattels, fixtures, and effects sold and delivered.

Per Cur.—The plaintiff could not recover the price fixed for these effects as for goods sold and delivered; but the question is, whether he cannot as for fixtures bargained and sold, or sold and delivered. The real nature of the contract between the plaintiff and the defendant was, that the plaintiff should waive his right of removal, and thereby give up to the defendant all his interest in and right to enjoy these effects as chattels; and after the contract is executed, and the plaintiff has given up possession to the defendant, the question is, whether he may not declare as for fixtures bargained and sold, or sold and delivered. We are of opinion that he may.

Fleet Prison. See tits. *Prison—Prisoner.*

Forcible Entry and Detainer.

COLE *v.* EAGLE, T. T. 1828. K. B. 8 *B. & C.* 409.

The stat. 8 Hen. 6, c. 9, s. 6, extends only to parties having the freehold interest*.

THIS was an action of trespass for breaking and entering the dwelling-house of the wife, while sole, and expelling her. The first count, which was framed on the stat. 8 Hen. 6, c. 9, s. 6, shewed that the wife was tenant, with certainly no higher interest than that of a tenancy from year to year, and then charged that the defendants entered with a strong hand and expelled her. To this were added counts in trespass at common law. The plaintiffs recovered 5*l.* damages.

* In trespass on 8 Hen. 6, c. 9, for a forcible entry and detainer:—Held, that, if persons either take or keep possession of house or land with such number of persons and show of force as is calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry or a forcible detainer. (*Milner* v. *Maclean*, E. T. 1825, N. P., 2 C. & P. 17).

Per Cur.—It appears to us quite clear, that the statute in question is applicable only to persons who have the freehold. A disseisor is a person who takes the freehold: in the times when the statute was framed a tenant from year to year was little known, and even tenants for years were very little regarded.

See Rex v. *Downey*, 1 *Ld. Raym.* 510.

REX *v.* WILLIAMS, E. T. 1829. K. B. 9 *B. & C.* 549.

Upon an indictment for forcible entry, the party whose land was entered is not a competent witness.

UPON an indictment under 21 Jac. 1, c. 15, for a forcible entry, which gives justices the power to reseise and restore the possession.

The Court held, that the prosecutor and parties whose land had been entered upon were not competent witnesses, distinguishing the cases where the objects of the Legislature are the detection and conviction of the offender, and where not; in the latter the general rule applies, and the party to be benefited is incompetent.

REX *v.* OAKLEY, M. T. 1832. K. B. 4 *B. & Ad.* 308; S. C. 1 *N. & M.* 58.

A conviction for a forcible detainer must shew an unlawful entry;

THE defendants were brought into Court upon habeas corpus, by the return to which it appeared that they were detained in custody under the authority of a warrant under a conviction for a forcible detainer.

Per Cur.—The question arises upon the stat. 8 Hen. 6, c. 9, which, after reciting the 15 Ric. 2, contains this explicit declaration, "and for that the said statute does not extend to entries in tenements in peaceable manner, and after holden by force." So, that before that, where the entry was peaceable, the holding by force was not within the jurisdiction of the magistrates. Then the question is, Is it within the provisions of the stat. of Hen. 8? It has been argued, that detaining forcibly is sufficient to bring the case within that statute. We are of opinion that that is not sufficient. Though it may be a misdemeanor at common law, there is no detainer within the meaning of that statute, except where the entry is unlawful. A forcible detainer after a peaceable entry is within the statute, but a person may enter peaceably but yet not lawfully; it by no means follows that because he may have entered peaceably, therefore he had any lawful right to enter, and an unlawful entry has a tendency to a breach of the peace, however peaceable it may be. It should appear upon the record that the entry was unlawful: that not appearing in this case, there is not sufficient upon the face of this record to support the conviction.

REX *v.* WILSON, T. T. 1835. K. B. 5 *N. & M.* 164.

and not merely an unlawful ejection.

UPON a conviction for an unlawful detainer, it was contended, that the conviction in this case is for an unlawful detainer, and no unlawful entry is averred at all in the information; the justices appearing to have considered it to be not of the slightest importance whether the entry was lawful or not, but under the stat. Hen. 6, c. 9, there can be no detainer unless the entry be unlawful.

The Court held, that the conviction for a forcible detainer under 8 Hen. 6, c. 9, must state, that the entry of the party detaining by force was unlawful, and not merely an unlawful ejection.

REX *v.* HARLAND, M. T. 1838. Q. B. 1 *P. & D.* 93; S. C. 2 *Moody*, C. C. 141.

THE grand jury found a true bill against the defendants on an indictment for a forcible entry and detainer of premises at Ripon. An application was made to *Williams*, J., for a writ of restitution; he granted a rule to shew cause, and, after hearing counsel and affidavits on both sides, discharged the rule.

The Court will not interfere with the discretion of the judge as to granting restitution*.

Per Cur.—We should regret if we were to interfere. Under the 8 Hen. 6, c. 9, the justices must award restitution when the force is found. It is absurd to construe this enactment as compelling a judge to act on the finding of a grand jury, where neither he nor the parties charged were present. Such a case is totally different from the inquisition taken by justices on a view of the premises and the examination of witnesses. Clearly the judge has a discretionary power in according the writ of restitution.

REX *v.* WILSON, T. T. 1836. K. B. 6 *N. & M.* 625; S. C. 1 *Ad. & E.* 627.

UPON a conviction for forcible entry and detainer the party traversed the issue, and an inquisition was thereupon had, and an award of restitution indorsed upon the inquisition.

And where the conviction is quashed restitution must be awarded.

The Court having, upon certiorari, quashed the conviction; held, that it could not sustain the inquisition as a substantial proceeding, and that it had no discretion, but that restitution must be awarded.

Forcible Marriage. See tit. *Abduction*.

Foreclosed. See tit. *Mortgage*.

Foreign Attachment.

KEAT *v.* GOLDSTEIN, M. T. 1827. K. B. 1 *M. & Ry.* 305; S. C. 7 *B. & C.* 525.

ONE of several defendants, in a proceeding by foreign attachment in the Mayor's Court of London, removed it by certiorari. A rule for bail was served, and bail was put in for Goldstein but not for Castles. On motion for a procedendo—

If one of several defendants removes a foreign attachment by certiorari, he must put in bail for his co-defendants.

Per Cur.—The cause was commenced in the Court below, and the attempt to remove it fails, because both the defendants are not before this Court.

* In order to authorize a justice to award restitution pursuant to an inquisition taken under the 8 Hen. 6, c. 9, for a forcible entry, the inquisition should set forth the estate possessed by the party in the property disputed. (*Reg.* v. *Bowser*, M. T. 1839, B. C., 8 D. P. C. 128).

On an indictment for a forcible entry into &c., then and there being in the possession of W. P., "the said W. P. *then* and *there* being also seised thereof:" —Held to be sufficient to warrant the Court in awarding a writ of restitution. (*Rex* v. *Hoare*, 6 M. & S. 266).

M'Grath *v.* Hardy, T. T. 1838. C. P. 4 *Bing. N. S.* 782; S. C. 6 *D. P. C.* 749.

It is not necessary that any notice should be given to the defendant on the attachment, and after execution executed the garnishee is discharged*.

To assumpsit for money had and received; plea, a recovery by foreign attachment by a creditor of the plaintiff, and that such creditor had execution thereof. Replication, no execution executed, pursuant to the custom, and issue thereon.

The Court held, 1st, that an allegation that the plaintiff had no notice of the proceedings in the foreign attachment was no answer to the plea, the custom being found not to require that any notice should be given to the defendant in the attachment; 2ndly, that the custom alleged in the plea, that after execution had and executed the garnishee should be discharged, and it being expressly found that no writs of execution were issued on the defendant or garnishee, the plaintiff was entitled to judgment on that issue; that the defendant, by taking issue on that replication, was not precluded from proving, and the jury from finding, according to the fact; and that the attorney of the garnishee was not incompetent to prove the custom.

Foreign Country.

Lane *v.* Bennett, H. T. 1836. Ex. 1 *M. & W.* 71.

Notwithstanding the Act of Union and the 3 & 4 Will. 4, Ireland is still a country beyond the seas.

Debt for goods sold and delivered. Pleas, nil debet and the Statute of Limitations. To which the plaintiff replied, that at the time when the debt accrued the defendant was in parts beyond the seas, to wit, in Ireland; and that they commenced their suit within six years after his return into this kingdom. Rejoinder, that he was not in parts beyond the seas at the time of the accruing of the debt. The plaintiffs proved that they supplied goods to the defendant, who was a surgeon in a cavalry regiment in Ireland, in the year 1826. There had been a part payment of the bill, and the action was brought for the balance. It was objected, that Ireland was not beyond the seas, and therefore the replication was not proved.

The Court held, that Ireland is still a place beyond the seas within the statute, 4 Anne, c. 16, s. 19, which has not been affected by the Act of Union, nor by the 3 & 4 Will. 4, c. 42, s. 7.

Battersby *v.* Kirk, H. T. 1836. C. P. 2 *Bing. N. S.* 584.

And Ireland is in parts beyond the seas under the Bristol Dock Act.

Upon this special case the question was, whether linens, the produce and manufacture of Ireland, imported from Belfast, in Ireland, into the port of Bristol, are or are not liable to the duty imposed by the 38th section of the Bristol Dock Act, 48 Geo. 3, c. 11. The duty is imposed by that section "on goods, wares, and merchandize imported from parts beyond the seas, and not brought by inland navigation into the port of Bristol;" and also "on goods, wares, and merchandize brought coastwise into the said port, of foreign

* When property was attached in the hands of the defendant:—Held, that, being really in custody of the law, his refusal to deliver it to the owner was no conversion. (*Verrall* v. *Robinson*, T. T. 1835, Ex., 4 D. P. C. 242).

growth or importation, but not of British growth or manufacture."

The Court held, that goods imported from Ireland were liable to the duties imposed by 48 Geo. 3, c. 11, (the Bristol Dock Act), upon "all goods, wares, or merchandizes imported from parts beyond the seas, and not brought by inland navigation into the port of Bristol."

Foreign Court*.

Foreign Enlistment.

DOBREE *v.* NAPIER, E. T. 1836. C. P. 2 *Bing. N. S.* 781.

IN trespass against the defendant, a British subject, for taking and seizing the steam-vessel of the plaintiffs, also British subjects.

The Foreign Enlistment Act will not bind parties with respect to acts done abroad so as to give a right of action here.

The Court held, 1st, that pleas alleging that defendant, acting as the officer and servant of a foreign power then at peace with our Lord the King, took and captured the vessel in question in the act of breaking a blockade duly established by such foreign power, and supplying the enemy of such power with stores, ammunition, &c., amounted to a good justification, notwithstanding the Foreign Enlistment Act, 59 Geo. 3, c. 69; and 2nd, that a plea by the defendant, that the plaintiffs had no right of action to recover the value of the steam-vessel, inasmuch as she was forfeited to the king under the 7th section of the stat. 59 Geo. 3, c. 69, without shewing an authority to make such seizure, is bad; for non constat that the king has not waived his right.

Foreign Judgment. See tits. *Foreign Law—Judgment.*

Foreign Law.

DOE *d.* BIRTWHISTLE *v.* VARDILL, E. T. 1826. K. B. 5 *B. & C.* 438; S. C. 8 *D. & R.* 185.

ON the question, whether a child who is born before the marriage of his parents can inherit real property in England, even although by the law of the country in which he was born, and in which his parents were married, he should be declared legitimate and capable there of inheriting.

Although the lex loci governs questions of marriage, yet the effect of

* The sentence of a foreign court of competent jurisdiction, condemning a neutral vessel taken in war as a prize, is good and binding against the world. (*Dobree* v. *Napier*, E. T. 1836, C. P., 2 Bing. N. S. 781).

such marriages does not follow the foreign law, but the law here.

Per Cur.—We are of opinion, that we should not be warranted in saying that we can give effect to this legitimizing of the child by the subsequent marriage of the parents in Scotland. It by no means follows, that because we allow the validity of the marriage, that therefore we are to allow all the consequences of that validity. It is not contrary to the law of England to say, that a marriage celebrated in any part of the world, according to the law of that particular place in which it is celebrated, is a good marriage in England. On the contrary, the law of England would be the law of all foreign countries, at least as to the manner and form of the celebration of the marriage; and allows every marriage to be a good marriage in England which is a good marriage by the law of the country in which it happened to be solemnized. It is part of the law of England to allow the validity of this marriage; but it by no means follows, that it is part of the law of England to allow the consequence which follows that marriage in this kingdom, and to allow the effect by which a child, born before the marriage of its parents, is considered to be born after their marriage. It appears to us by no means to follow, because you allow the validity of the marriage, you are to allow all the consequences which the law of the country in which the land is situated does not allow.

See Story's Conflict of Laws.

TRIMBY *v.* VIGNIER, T. T. 1834. C. P. 4 *M. & Scott*, 695; S. C. 1 *Bing. N. S.* 151; S. C. 6 *C. & P.* 25.

And the time and manner in which the contract is sought to be enforced must follow the law of the country where enforced*.

A PROMISSORY note was made in France by the defendant, a French subject, and then domiciled in France. The payee of the note indorsed it in blank, which mode of indorsement is, by the sections 137, 138 of the Code de Commerce, invalid, and passes no property. The holder, an English subject, and the defendant, the drawer, then residing and carrying on business in London—

The Court held, that the plaintiff's right to recover was to be decided, not by the law of England, but by that of France; and as the law of the latter country, under the circumstances, would give the plaintiff no right of action, neither could he maintain one in the

* A plea of prescription by the law of France omitted the exception in that law—viz. "that the debt is not acknowledged by a separate and distinct act of the party charged in writing:"—Held, that the plea was bad in form; but that such defence being available under the general issue, and the doctrine of prescription applying only ad litis ordinationem, taken from the lex fori where the suit is instituted, and did not prevail in this country, which adopts only that part of the law of the foreign courts which affects the rights and merits of the contract, the right of action was only barred in the foreign country, and not in this; the plea, therefore, of the Statute of Limitations here being avoided by the defendant's absence beyond sea since the cause of action accrued:—Held, that the plaintiff was entitled to recover. (*Huber* v. *Steiner*, 2 D. P. C. 781; S. C. 2 Scott, 304; S. C. 2 Bing. N. S., C. P., 202).

A foreigner coming to this country may be sued for a debt, although the claim may have been confiscated in his own country, if such confiscation be contrary to the usage of nations. (*Wolff* v. *Oxholm*, 6 M. & S. 92).

Where, in debt on a foreign judgment, the object of the pleas was to raise the question, whether, by the foreign law, an escape after being taken in execution was a satisfaction, the Court ordered the plea of nil debet to be struck out. (*Alivon* v. *Furnival*, H. T. 1831, Ex., 1 D. P. C. 690).

A foreign prince becoming a plaintiff voluntarily in a court of law in this country becomes subject as to all matters connected with that suit to the jurisdiction of the court of equity; and a discovery being necessary to the plaintiff's defence at law, demurrer, for that as against a sovereign the suit was not maintainable, overruled. (*Rothschild* v. *Queen of Portugal*, 3 Young & C. 594).

courts of this country. The rule which applies to the case of contracts made in one country and put in suit in the courts of law of another country appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made,—"lex loci contractus;" the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought.

BECQUET *v.* M'CARTHY, M. T. 1832. K. B. 2 *B. & Ad.* 951.

A French judgment, founded on the 1384th Article of the French Code, is not bad in law;

IN an action upon a judgment recovered in the island of Mauritius, where the French law prevailed, for loss occasioned by fire originating in the defendant's house—

The Court held, first, that this Court could not say, that the French judgment founded on the 1384th Article of the French Code was necessarily bad, because it was not averred in the proceedings that the action was caused by negligence; and secondly, the foreign law requiring that process against a party absent from the country at the time when the suit was commenced should be served upon the King's Attorney-General, the Court could not say the law was so contrary to natural justice as to render the judgment void. The party, at the time the cause of action arose, being resident within the jurisdiction, the Court would presume that the public officer would do whatever was necessary in the discharge of that public duty.

NOVELLI *v.* ROSSI, T. T. 1831. K. B. 2 *B. & Ad.* 757.

but a decree of a foreign court, misinterpreting the law of this country, is not binding in England.

AN acceptance was cancelled by mistake, and the mistake was discovered immediately, and the mistake written on the face of the bill. The bill was drawn in France, upon a person in England, and there accepted and made payable. One of the indorsees brought the question before a French court, which, in mistake of the English law, decided that the holder could not recover.

The Court held, nevertheless, that he might recover in an action against the indorser, who had so raised the question before the French court, although he had by their decision lost his remedy against the drawer and prior indorsers.

ALIVON *v.* FURNIVAL, T. T. 1834. Ex. 1 *C., M. & R.* 277; S. C. 3 *D. P. C.* 202; S. C. 4 *Tyrw.* 751.

If the original document, once deposited, cannot be removed, a copy is evidence. It will be presumed that foreign arbiters acted according to law; and an appeal pending in a foreign court is no ground for staying execution in England.

IN an action of debt by two out of three syndics of a French bankrupt, upon an arbitral sentence and ordinance adjudging that the defendant should pay a sum of money to the bankrupt—

The Court held, first, that an examined copy of the agreement of reference, which was entered into in France, verified by the attesting witness, although the agreement was expressed to be "fait au double," was good evidence, as the original was deposited with a notary, and it was proved to be the usage in France (though there was no written law upon the subject) not to allow the removal of documents so deposited. Secondly, that, although by the express agreement of the parties merchants were to be appointed as arbitrators, the Tribunal de Commerce, which it was agreed might name the arbitrators in case of disagreement, might appoint persons not

merchants; and that the proceedings of foreign tribunals must be assumed to be according to the law, unless the contrary were shewn. Thirdly, where a judgment had been obtained on a decree in the Cour de Première Instance, at Paris, on an award, the Court refused to stay execution, on the ground that the defendant had lodged an appeal against the decree in the Cour de Cassation, which prevented any execution in France upon the decree and award.

Forfeiture.

See, also, tits. *Attainder—Dower—Indictment—Landlord and Tenant—Outlawry—Treason.*

Doe *d.* Chandless *v.* Robson, 1826. N. P. 2 *C. & P.* 245.

In all cases of forfeiture for non-performance of any act, there must be some evidence of the omission to do the act prescribed.

In ejectment, on an alleged forfeiture by breach of two of the covenants contained in the lease, one of them being a covenant to pay the rent, and the other a covenant to duly keep in repair the pavement of a certain footpath, according to the provisions of a private act of Parliament—

Per Abbott, C. J.—No evidence was given, on the part of the lessor of the plaintiff, to shew that any rent had ever been demanded, or that the footpath was not in good repair, which he was bound to do.

Doe *d.* Rankin *v.* Brindley, M. T. 1832. K. B. 4 *B. & Ad.* 85; S. C. 1 *N. & M.* 1.

A right to re-enter for not repairing is not waived by further time being given, or receipt of rent due before the forfeiture*.

In ejectment, the day of the demise stated in the declaration was the 27th of June; and the right of entry was founded upon an alleged forfeiture of a lease. The lease, bearing date the 29th of September, 1830, contained a general covenant by the lessee to repair all buildings on the demised premises, and any that should thereafter be built thereon, &c. It further contained a proviso for re-entry, if, amongst other things, the thereby letten oil-mill, or any other erections or bridges standing on the thereby demised premises, or any of them, should not be built, repaired, amended, or maintained in manner aforesaid, within three months next after notice or warning in writing. In January, notice to repair was given. Upon the trial, upon the clause of re-entry for not repairing according to covenant, by order of nisi prius, by consent of parties a jury was withdrawn, and it was agreed that the premises should be put in repair by the 24th of June, to the satisfaction of two persons mentioned.

The Court held that this was no waiver of the notice, but merely an enlargement of the time within which the defendants were to repair, and that the lessor was therefore, after the 24th of June, entitled to recover, without giving a fresh notice; and that the receipt of rent due before forfeiture made no difference.

* So, a right to re-enter is not waived by the steward of the party allowing a contractor to proceed with work as if it had been waived, he having full knowledge of the facts. (*Doe* d. *Lord Kensington* v. *Brindley*, 12 Moore, 37).

Forgery*.

I. RELATIVE TO WHAT AMOUNTS TO, AND OF THE NATURE OF THE INSTRUMENT.

(*a*) In general, p. 87.

(*b*) In particular.

1. *Acquittance*, p. 87.
2. *Bills and Notes*, p. 88.
3. *Cheques*, p. 89.
4. *Colonial Bank Plate*, p. 89.

* By 1 Will. 4, c. 66—

Sect. 1. No forgeries, or other kindred offences, which are now capital, shall continue so, unless expressly made capital by this act. All forgeries heretofore capital, and not declared so by this act, shall be punished with transportation. Saving of acts relating to coin.

Sect. 2. Forging the great seal, privy seal, privy signet, royal sign manual, &c., treason, and capital.

Sect. 3. Forging an Exchequer bill, Exchequer debenture, East India bond, bank-note, bank post-bill, bill of exchange, promissory note, or any indorsements or acceptances of such several instruments, or any will, undertaking, or warrant, or order for payment of money, capital.

Sect. 4. If any instrument, however designated, is, in law, a will or bill of exchange, &c. &c., the forger of such instrument may be indicted under this act.

Sect. 5. Making false entries in the books in which the accounts of public stock are kept, or transfer of public stock in any other name than the true owner's, capital.

Sect. 6. Forging a transfer of any public stock, or of certain other stock, power of attorney to transfer the same, or to receive dividends thereon, transfer of stock or receipt of dividends by false personation, capital.

Sect. 7. Personating the owner of any public stock, or certain other stock, and endeavouring to transfer or to receive the dividends, transportation for life, &c.

Sect. 8. Forging the attestation to any power of attorney for transfer of stock, &c., transportation for seven years, &c.

Sect. 9. Clerks of the bank wilfully making out dividend warrants for a greater or less sum than what is really due, transportation for seven years, &c.

Sect. 10. Forging a deed, bond, court roll, or copy of court roll, of copyhold or customary estates, receipt for money or goods, or an accountable receipt, or an order for delivery of goods, transportation for life, &c.

Sect. 11. Fraudulently acknowledging any recognizance, bail, fine, recovery, or judgment in the name of another, transportation for life, &c.

Sect. 12. Knowingly purchasing or receiving, or having in possession, forged bank-notes, &c., or blanks thereof, transportation for fourteen years.

Sect. 13. Making or having, without authority, any mould for making paper with the words "Bank of England" visible in the substance, or for making paper with curved bar lines, numerical Roman figures, &c. &c., or selling such paper, transportation for fourteen years.

Sect. 14. Proviso as to paper used for bills of exchange.

Sect. 15. Engraving on any plate, &c., any bank-note, blank bank-note, &c., or using and having such plate, &c., or uttering or having paper upon which a blank note, &c., shall be printed, without authority, transportation for fourteen years.

Sect. 16. Engraving on any plate, &c., any word, number, or ornament resembling any part of a bank-note, &c., or using or having any such plate, &c., or uttering or having any paper on which there shall be an impression of any word, number, &c., transportation for fourteen years.

I. RELATIVE TO WHAT AMOUNTS TO, AND OF THE NATURE OF THE INSTRUMENT—(*continued*).

5. *Goldsmiths' Mark*, p. 89.

6. *Irish Notes*, p. 89.

7. *Legal Proceedings*, p. 89.

8. *Marriage Register*, p. 89.

9. *Order or Warrant*, p. 90.

10. *Power of Attorney*, p. 90.

11. *Prisoner's discharge*, p. 91.

12. *Receipt*, p. 91.

13. *Request*, p. 91.

14. *Will*, p. 92.

Sect. 17. Making or having in possession any mould for manufacturing paper with the name of any bankers appearing in the substance, manufacturing or having such paper, or causing the name to appear in the substance of any paper, transportation for fourteen years, &c.

Sect. 18. Engraving on any plate, &c., any bill of exchange or promissory note of any bankers, or any words resembling the subscription subjoined thereto, or using any such plate, or uttering or having any paper upon which any part of any such bill or note shall be printed, transportation for fourteen years, &c.

Sect. 19. Engraving plates, &c., for foreign bills or notes, using or having such plates, or uttering any paper in which any part of such foreign bill or note may be printed, transportation for fourteen years, &c.

Sect. 20. Inserting any false entry in any register of baptisms, marriages, or burials, forging or altering any such entry, uttering any writing as a copy of any false or forged entry, destroying, &c., the register, forging any license of marriage, transportation for life, &c.

Sect. 21. Rector, &c., not liable to any penalty for correcting, in the mode prescribed, accidental errors in the register.

Sect. 22. Inserting in any copy of a register of baptisms, marriages, or burials, transmitted to the registrar, any false entry, or forging or verifying any copy knowing it to be false, transportation for seven years, &c.

Sect. 23. The punishments of 5 Eliz. c. 14, so far as they have been adopted by other acts, shall be repealed, and other punishments substituted.

Sect. 24. All forgers and utterers may be tried in the county where they are apprehended or are in custody, and accessories where principals may be tried.

Sect. 25. As to principals in the second degree and accessories.

Sect. 26. The Court may order hard labour or solitary confinement for offences against this act.

Sect. 27. As to offences committed at sea.

Sect. 28. Rule of interpretation as to criminal possession, and as to parties intended to be defrauded.

Sect. 29. This act not to extend to Scotland or Ireland.

Sect. 30. But to apply to the forging or uttering in England documents purporting to be made, or actually made, out of England, and to the forging or uttering in England bills of exchange, promissory notes, bonds, &c., purporting to be payable out of England.

Sect. 31. Repeal of acts previously in force relating to forgery. Offences, &c., committed previous to the repeal may be tried under the old acts after the repeal. Proviso.

Sect. 32. Commencement of this act. See also 2 & 3 Will. 4, c. 123; 6 & 7 Will. 4, c. 86.

By 1 Vict. c. 84—

Sect. 1. Persons convicted of any of the offences herein mentioned to be liable to be transported.

Sect. 2. So much of 2 & 3 Will. 4, c. 123; 3 & 4 Will. 4, c. 51, s. 27; and 3 & 4 Will. 4, c. 44, as relates to the punishment of certain offences, repealed; such offences to be punished by transportation for life or for years.

II. RELATIVE TO THE INDICTMENT, p. 92.

III. RELATIVE TO THE EVIDENCE, p. 94.

IV. RELATIVE TO THE WITNESSES, p. 95.

V. RELATIVE TO THE PUNISHMENT, p. 95.

I. RELATIVE TO WHAT AMOUNTS TO, AND OF THE NATURE OF THE INSTRUMENT.

(*a*) In general*.

SCHULTZ *v.* ASTLEY, H. T. 1836. C. P. 2 *Bing. N. S.* 544; S. C. 2 *Scott*, 815; S. C. 7 *C. & P.* 99.

It is not a forgery for a party to sign the name as T. W. where his real name is T. W. R., unless it be shewn that the omission of the surname was for the purpose of fraud.

THE defendant gave his acceptances in blank to M. H. Two of these afterwards, before they were filled up, and whilst they had no writing upon them, except the defendant's name, were signed and indorsed by a stranger to the defendant; another was filled up by a person named Thomas Wilson Richardson, as drawer and indorser, who upon this occasion signed as Thomas Wilson.

Per Cur.—We think that such modes of drawing and indorsing did not invalidate the bills, as there were no circumstances proved to shew an intention to pass himself off for a different person of the name of Thomas Wilson, or an intention to defraud any person of that name, or any other person; and we, therefore, think there is no ground for treating the signature as a forgery, or holding the bill void on that account.

(*b*) In particular.

1. *Acquittance*†.

Sect. 3. Persons convicted of offences punishable by imprisonment may be kept to hard labour and solitary confinement.

Sect. 4. Not to affect powers of 5 & 6 Will. 4, c. 38, and 4 Geo. 4, c. 64.

Sect. 5. Commencement of act.

The 55 Geo. 3, c. 73, and 11 Geo. 4, c. 112, extended to cases of forgery and obtaining money by false pretences from partners or bodies corporate by 6 Geo. 4, c. 56.

* Giving a forged note to an agent or accomplice that he might pass it:—Held to be a sufficient disposing thereof to him, and a conviction for disposing and putting it away, right. (*Rex* v. *Giles*, 1827, 1 Moody, C. C. 166).

† A servant employed by her mistress to pay tradesmen's bills received from her a bill of a tradesman named Sadler, together with the money to pay that and other bills. She brought the bill again to her mistress, with the words "paid Sadler" on it, the word "sadler" being written with a small s, and there being no initial of the Christian name of the tradesman. The mistress stated, that she believed the words to be a receipt, and that no application was made for the money afterwards:—Held, on an indictment for forgery, that the words "paid Sadler," under the circumstances, imported an acquittance for the money, and were not merely a memorandum by the servant of her having paid the bill. (*Reg.* v. *Houseman*, 1837, N. P., 8 C. & P. 180).

2. *Bills and Notes.*

Rex *v.* Geach, 1840. N. P. 9 *C. & P.* 499.

An intention to take up a forged bill does not alter the offence*.

On an indictment for forgery, it appeared that the prisoner uttered a forged acceptance knowingly, and believing that money would be advanced by bankers on it.

* So, where the prisoner uttered a bill, all the names on which were fictitious, but known to be so to the party to whom it was tendered in payment of a debt, although it was believed that he intended to provide for it when at maturity:—Held, that the prisoner was properly convicted. (*Reg.* v. *Hill*, 1837, 2 Moo. C. C. 30). Forging an acceptance of an incomplete instrument, as where at the time no drawer's name was inserted:—Held, not a forgery of an acceptance of a bill of exchange within 1 Will. 4, c. 66, s. 64. (*Rex* v. *Butterwick*, 1837, 2 Mood. C. C. 196). So, where the prisoner was charged with uttering a forged bill, it appeared that the bill was not addressed to drawee by name, but at a house of business, and having an acceptance forged on it:—Held, to be properly described as a bill of exchange. (*Reg.* v. *Hawkes*, 1837, 2 Moo. C. C. 60). The writing an acceptance of an existing person without authority, or of a non-existing firm or person, with intent to defraud, is forgery. (*Reg.* v. *Rogers*, 1838, C. C. C., 8 C. & P. 629). So, where the prisoner, having received from the prosecutor a bill dated at three months, and afterwards alleging that he could not get one for so large an amount discounted, prevailed on the prosecutor to accept one for a smaller sum, and, pretending to destroy the former one, afterwards altered it to a date of twelve months:—Held to be a forgery, with intent to defraud the prosecutor. (*Rex* v. *Atkinson*, 1837, C. C. C., 7 C. & P. 669). Where, from previous dealings, a party has used the name of another on bills, under a bonâ fide belief that he had authority to do so, and without intention to defraud, the jury ought to acquit him. (*Rex* v. *Parish*, 1837, N. P., 8 C. & P. 94; S. P. *Reg.* v. *Beard*, 1837, N. P., 8 C. & P. 143; S. P. *Rex* v. *Forbes*, 1835, N. P., 7 C. & P. 224). And the fact, that, on three or four previous occasions, when he had drawn bills in that way, the party whose name was used had paid even without remark or remonstrance, would afford fair ground for the belief that he had such authority. But, if a person, wishing to raise money, put the name of another on a bill without his authority, intending to pay the bill when due, and believing that he should be able to do so, this is forgery. So, if a person, relying on the kindness of another (a near relation, for instance), uses his name on a bill without authority, trusting that that person will pay it, rather than there should be a criminal prosecution on the subject, this also is forgery. (*Reg.* v. *Beard*, 1837, N. P., 8 C. & P. 143). A letter written by the prisoner to a third person, saying that his name was on another bill, and desiring him not to say that it was a forgery:—Held admissible as proof of a guilty knowledge, though not of actual forgery, without such other bill being produced. (*Rex* v. *Forbes*, 1835, N. P., 7 C. & P. 224). It is forgery for a person having authority to fill up a blank acceptance for one sum only to fill up the bill for a larger sum. (*Rex* v. *Hart*, 1836, 1 Moody, C. C. 486; S. C. 7 C. & P. 652). The forging an instrument in the form of a promissory note for 100*l.*, or such other sum not exceeding that sum, as the payee might incur by reason of becoming surety to the sheriff for his officer:—Held to be a forging an undertaking for the payment of money within 1 Will. 4, c. 66, s. 3. (*Rex* v. *Reed*, 1838, N. P., 8 C. & P. 623). Where the prisoner deposited a forged acceptance with bankers, which he hoped would be a security for what he owed, to which the manager replied that it would depend on the result of inquiries as to the acceptor:—Held a sufficient uttering. And where a party utters what he knows to be a forged instrument, it is a consequence that he intends to defraud the party to whom he utters it:—Held also, that writing an acceptance on a blank stamp, which is afterwards filled up by another, would not amount to a forgery of the acceptance of a bill. (*Rex* v. *Cooke*, 1838, N. P., 8 C. & P. 582). On the trial of an indictment for uttering a forged bill of exchange, if the jury are satisfied that the prisoner uttered the bill as a true bill, meaning it to be taken as such, and at that time knew it to be forged, they ought to find, as a necessary consequence of law, that the prisoner intended to defraud; and the jury ought to infer the intent to defraud if they are satisfied on the two other points. (*Rex* v. *Hill*, 1838, N. P., 8 C. & P. 274).

The Judge held, that it was not the less a felony that he intended to take up the bill, and afterwards paid it, the offence being complete at the time of the uttering it.

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3. *Cheques.*

REX *v.* BACKLER, 1831. O. B. 5 *C. & P.* 118.

Drawing a cheque on a banker's where no such person keeps an account is forgery.

ON an indictment for forgery, a cheque, purporting to be drawn by G. A. upon Messrs. J. L. & Co., proof that no person named G. A. kept an account with or has any right to draw on Messrs. J. L. & Co.—

Parke, J., held that to be primâ facie evidence that G. A. was a fictitious person, and amounted to forgery.

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4. *Colonial Bank Plate**.

5. *Goldsmiths' Mark*†.

6. *Irish Notes*‡.

7. *Legal Proceedings*§.

8. *Marriage Register*‖.

* Under the 1 Will. 4, c. 66, s. 10, a party having unlawfully possession of a copper plate of a colonial bank is an offence within the statute. (*Reg.* v. *Hannon*, 9 C. & P. 11; S. C. 2 Moo. C. C. 77).

† A person may be found guilty under the stats. 13 Geo. 3, c. 52, s. 14, and 38 Geo. 3, c. 69, s. 7, if he be proved to have transposed the mark of the Goldsmiths' Company from one gold ring to another, although both rings be genuine, and although the jury may be of opinion that he did so without any fraudulent intention. (*Rex* v. *Ogden*, 1834, C. C. C., 6 C. & P. 631).

‡ Uttering in England forged notes payable in Ireland only:—Held, within the forgery acts prior to 11 Geo. 4 & 1 Will. 4, c. 66. (*Rex* v. *Kirkwood*, 1831, 1 Moo. C. C. 311).

§ The practice of issuing county court processes in blank, for the attornies to fill up after they have been issued by the county clerk, is highly irregular; and semble, that the filling up of a county court summons, or altering a distringas into a summons after it has been so issued in blank, is a forgery at common law. (*Rex* v. *Collier*, 1831, N. P., 5 C. & P. 160).

‖ The stat. 1 Will. 4, c. 66, s. 20, makes it an offence (inter alia) to utter any writing as and for a copy of an entry in any register of marriages made or kept by the vicar, &c. of any parish in England:—Held, first, that the indictment for that offence need not set out the instrument, as the words of the 2 & 3 Will. 4, c. 123, s. 3, stating it to be sufficient in forgery, &c. to describe the instruments as in an indictment for stealing it, are applicable to such a case, although the instrument itself could not be the subject of an indictment for larceny; and 2ndly, that the Judges could take judicial notice that the parish of Leighford, in the county of Stafford, is a parish in England, and that the indictment need not aver that fact. (*Rex* v. *Sharpe*, 1838, C. C. C., 8 C. & P. 436).

9. *Order or Warrant.*

REX *v.* CULLEN, 1831. O. B. 5 *C. & P.* 116.

The order must be directed to some person*.

A PAPER in the terms, "Per bearer, two 11—4 superfine counterpanes. T. D., E. T.;" but not addressed to any one, although presented with the intent of obtaining the goods.

The Judge held the paper to be neither an *order* nor *request* within the 1 Will. 4, c. 66, s. 10.

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10. *Power of Attorney*†.

* But, in a subsequent case, a prisoner was indicted on the 2 & 3 Will. 4, c. 123, for forging a warrant for the payment of money, (not setting it out). The forged paper was as follows:—"This is to *satisfy* that R. B. *as* swept the flues and cleaned the bilges, and repaired bridges of the Princess Victoria. (Signed) J. N., 4*l.* 10*s.*" It was proved, that, by the course of dealing between the parties, the voucher, if genuine, would have authorized S. & Co. to pay 4*l.* 10*s.*:—Held, that it is not necessary that a warrant for the payment of money should be addressed to any particular person; and that, as it appeared that this document, if genuine, would have been a voucher for the payment of money mentioned in it, that was a sufficient proof of the allegation that it was a warrant for the payment of money; and that if in an indictment for forgery the instrument be described and not set out, it is matter of evidence whether the instrument comes within the designation given of it in the indictment or not; and that averments to shew that the document comes *within* the designation given of it in the indictment, are now (in this form of indicting) unnecessary. (*Reg.* v. *Rogers*, 1839, C. C. C., 9 C. & P. 41).

The forging of a paper by which the supposed writer promises to pay to W. B. or order 100*l.*, or such other sum not exceeding the same, as he may incur by reason of his becoming one of the sureties to the sheriff of G., for J. R., a sheriff's officer, is a forging of an undertaking for the payment of money under the stat. 1 Will. 4, c. 66, s. 3. (*Rex* v. *Reed*, 1838, N. P., 8 C. & P. 623).

Indictment for forging an order for payment of money. The instrument was an order to pay prisoner or order the sum of 4*l.* 5*s.*, being a month's advance on an intended voyage to Quebec in the ship Mary Ann, as per agreement with G. M., master. The prisoner had in the margin of the order written, "On receiving this cheque I agree to sail, and to be on board within sixteen hours from the date of this cheque:"—Held, a good order for payment of money within the meaning of the stat. 11 Geo. 4 & 1 Will. 4, c. 86, s. 3. (*Rex* v. *Bamfield*, 1834, 1 Moo. C. C. 416).

The prisoner having obtained an order for payment, signed in the names of the chairman and one guardian, added the name of another:—Held, that by uttering the instrument he put forth as true whatever was stated in it, and it appearing from the minutes that another person was chairman on the day of the date was immaterial. (*Reg.* v. *Pike*, 1839, 2 Moo. C. C. 70).

It is not any offence under the stat. 1 Will. 4, c. 66, to forge an indorsement upon a warrant or order for the payment of money; nor, if a party write on the back of a bill of exchange, "Received, for R. A.," and sign his own name to it, is he guilty of forging a receipt within the provisions of that statute. (*Rex* v. *Arscott*, 1834, O. B., 6 C. & P. 408).

On an indictment for uttering a forged order for goods, the letter purporting only to be a request, and the person whose name was forged having no authority to order:—Held wrong; as he might have been indicted for uttering a forged request. (*Reg.* v. *Newton*, 2 Moo. C. C. 59).

In forgery, the order charged as forged ought to import that the person making it has a disposing power over the subject of the order, or there ought to be proof that the person in whose name it is made had such power. (*Rex* v. *Baker*, 1829, 1 Moo. C. C. 231).

† Where one of several trustees (a partner in a banking firm) executed a forged power of attorney to enable the partners, or either of them, to sell out the trust stock, and the other partners had signed the receipts for the money, but which, after being paid into the city bankers of the firm and credited and entered into the pass-book, he had intercepted and kept out of the house-book of the firm;

11. *Prisoner's Discharge**.

12. *Receipt*†.

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13. *Request.*

REGINA *v.* WHITE, 1840. N. P. 9 *C. & P.* 282.

INDICTMENT for forgery under the 7 & 8 Geo. 4. The forged request contained an order to let the prisoner have goods, and also contained a promise to answer for the amount.

A request for goods may also be for the payment of money‡

Gurney, B., held, that the latter part did not render the instrument less a forged request within the act.

the Judge, assuming the validity of the power of attorney, directed the jury, that, in the absence of any authority under it to pay the money to one party, who according to the ordinary course of business was not entitled to receive it, payment to him was no discharge; the unusual mode of transacting the business of the firm might avail as between the partners, but not as between them and the plaintiffs. (*Stone* v. *Marsh*, H. T. 1826, N. P., 1 Ry. & M. 364). So, where bankers employed to receive dividends in the funds had in their own books credited their employers with the dividends as received, and had allowed them to draw without having any other funds in their hands:—Held, that the bankers were bound by the entries so acted on, though not communicated; and that they could not set up as a defence that the entries had been fraudulently made by one of the partners, the money never having been received by the house. (*Hume* v. *Bolland*, 1826, N. P., 1 Ry. & M 371). The forgery of a power of attorney for any pension due, or supposed to be so, is within 7 Geo. 4, c. 16, s. 38, although it may be that no such pension exists to which such document professes to relate (*Reg.* v. *Pringle*, 1839, 2 Moo. C. C. 127). A power of attorney under seal to transfer stock in the public funds is a deed; and the uttering of such a power of attorney, knowing it to be forged, is an uttering of a forged deed within the stat. 2 Geo. 2, c. 25, s. 1, and is a capital offence under that statute. (*Rex* v. *Fauntleroy*, M. T. 1824, N. P., 1 C. & P. 421; S. C. 1 Moo. C. C. 52; S. C. 2 Bing. 413).

* An indictment had been found against A. for an assault, on which the clerk of the peace had granted a certificate upon which a magistrate committed A. to the county gaol till he should find sureties or otherwise be discharged by due course of law. A. wrote a forged letter in the name of another magistrate to the governor of the county gaol, stating that A. had found sureties, and authorizing the discharge of A.:—Held, that the writing and uttering of this forged letter was an indictable offence. (*Rex* v. *Harris*, 1833, N. P., 6 C. & P. 129; S. C. 1 Moo. C. C. 393). Indictment for forging an order for relief to a discharged prisoner under 5 Geo. 4, c. 85, being in many instances ungrammatical and at variance from the act:—Held bad. (*Rex* v. *Donnelly*, 1835, 1 Moo. C. C. 438).

† Where the prisoner, on quitting the office of assistant-overseer, delivered over to his successor, amongst other vouchers, a paper in the usual form, "£—— for the high constable. Signed, J. H.;" which had been altered to a larger sum:—Held, to amount to an uttering a forged receipt with intent to defraud the high constable. (*Reg.* v. *Boardman*, 1839, 2 Moo. C. C. 147). So, where the prisoner acting for his father, an overseer, received a receipt for a county-rate from the high constable for the sum of 3*l.* 5*s.* 9*d.*, which, on payment, the constable subscribed, "Received the above rate;" and the prisoner afterwards inserted a figure 1 before the 5*s.*:—Held, to be a forgery of the receipt, and that the instrument might be described in the same way as if the subject of larceny. (*Reg.* v. *Vaughan*, 1838, N. P., 8 C. & P. 276). Where the prisoner gave his employer a bill, subscribed with a receipt for the amount of goods, and the jury found that it was uttered for the purpose of deceiving into a belief that money given had been applied to the purpose for which it had been obtained, being a mere pretence and fraud:—Held, that he was properly convicted of uttering a receipt with intent to defraud. (*Rex* v. *Martin*, 1836, 1 Moo. C. C. 483; S. C. 7 C. & P. 549).

‡ And under s. 10 of 11 Geo. 4 & 1 Will. 4, c. 66:—Held, that it was not necessary the request should be addressed to any individual. (*Rex* v. *Carney*,

14. *Will**.

II. RELATIVE TO THE INDICTMENT†.

REX *v.* CARTER, 1834. C. C. C. *7 C. & P.* 134.

The indictment may describe

A FORGED request for the delivery of goods was addressed, in her maiden name, to A. B., who, prior to the date of it, was married.

1832, 1 Moo. C. C. 351). A forged paper, in the following form:—"Please let the lad have a hat, and I will answer for the money, E. B.," is a forged request for the delivery of the goods. (*Reg.* v. *White*, 1840, N. P., 9 C. & P. 282). So, a paper, in the following form, held to be a request for the delivery of goods, though not addressed to any one:—" August 3, —39, one 16 in. helmet scoop, one 4 qt. kettle. Jas. Hayward." (*Reg.* v. *Pulbrook*, 1839, C. C. C., 9 C. & P. 37).

On an indictment for uttering a forged request for the delivery of goods, it appeared that the letter requested the prosecutor to let the prisoner have such things as he wanted, going on to allege a previous statement of the prisoner, that the sister had money in her hands, to which the prisoner would be entitled:—Held, that such letter was a forged request within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10. (*Reg.* v. *Thomas*, 1837, 2 Moo. C. C. 16). So, where the prisoner represented that a relative had died and left him money, which was in the hands of C., and that he wanted mourning; and afterwards produced a letter as from C., in the terms, "Please to let W. T. (the prisoner) have such things as he wants. I have got the amount of 27*l.* for C. in my hands these many years:"—Held, that it was a forged request within the 11 Geo. 4 & 1 Will. 4, c. 66, s. 10, although, semble, the case might have been considered as false pretences. (*Rex* v. *Thomas*, 1837, N. P., 7 C. & P. 851). A forged paper, addressed to a tradesman, and purporting to be signed by one of his customers, in the following form:—" Please to let bearer, William gof, have spillshoul and grafting tool for me," is a forged request for the delivery of goods within the stat. 1 Will. 4, c. 66, s. 10. (*Rex* v. *James*, 1838, N. P., 8 C. & P. 292).

* In an indictment on 7 & 8 Geo. 4, c. 29, s. 22, for secreting a will, the fraudulent purpose must be stated; and the application of the estate for the benefit of the creditors of the sole next of kin taking out administration would be a fraudulent purpose within the statute. (*Reg.* v. *Morris*, 1839, N. P., 9 C. & P. 89).

A., an attorney, was employed by B., as his solicitor, to put out money upon mortgage. C. applied to A. to procure him the advance of money on mortgage, and to act as his solicitor in procuring it. C. stated to A. that he was the owner of certain freehold lands, and produced a forged will in proof of his title, which he placed in the hands of A. B. advanced the money, A. acting as his solicitor by preparing the mortgage-deeds, &c.:—Held, that, on the trial of C. for uttering the forged will, A. was bound to produce the will, and also to give evidence of what C. said to him as to the advance of the money. The forgery of the will of a non-existing person is an offence within the stat. 1 Will. 4, c. 66, s. 3. (*Reg.* v. *Avery*, 1838, N. P., 8 C. & P. 596).

† A count in an indictment for uttering a forged deed described it as " a certain deed, purporting to be made on the 1st day of March, 1837, between R. W., of the one part, and D. G., of the other part, purporting to be an under-lease by the said R. W. to the said D. G. of certain lands, tenements, and premises therein mentioned, subject to the payment of the yearly rent of 8*l.*, payable on the 1st day of March in every year, and purporting to contain a covenant by the said D. G. with the said R. W. for the payment by the said D. G. to the said R. W. of the yearly rent of 8*l.*:"—Held good under the stat. 2 & 3 Will. 4, c. 123, s. 2. (*Reg.* v. *Davies*, 1840, N. P., 9 C. & P. 427). Held, that a receipt signed by the captain of a detachment, on the authority of which money is received from an army agent on account of the monthly subsistence for such detachment, may be properly described as " a receipt for money," under the stat. 2 & 3 Will. 4, c. 123, s. 10, relating to forgery, although it appeared that such instruments were frequently cashed (upon indorsement) by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by

The Recorder, who tried the case, doubted if the indictment was sustained, there not being any averment of an intent to defraud the document payable to the

them of the army agent. (*Rex* v. *Rice*, 1834, C. C. C., 6 C. & P. 634). So, altering a regimental receipt for the subsistence money:—Held to be properly charged as a forgery of a receipt for money, although the instrument in its effect might be used and operate as an order for payment. (*Rex* v. *Hope*, 1834, 1 Moo. C. C. 414). On an indictment for forging an instrument, in the terms, " Twenty-one days after date pay (without acceptance) to the order of ——, ——*l.*":—Held, that it was properly described as a bill of exchange. (*Reg.* v. *Kinnear*, 1837, N. P., 2 M. & Rob. 117). So, a forged cheque on a banker:—Held, properly described as " a warrant and order for the payment of money," and that the presenting for payment at a bankers', where it was supposed the drawer had funds, although he was not a customer there, was sufficient evidence of an intent to defraud the bankers. (*Rex* v. *Crowther*, 1832, N. P., 5 C. & P. 316—Per *Bosanquet*, J.). So, a count in an indictment for forging a request for the delivery of goods, which describes the forged instrument as " a certain forged request for the delivery of goods to one J. R.," is good under the stat. 2 & 3 Will. 4, c. 122, s. 2, and is not too general. (*Reg.* v. *Robson*, 1840, N. P., 9 C. & P. 423). Under 2 & 3 Will. 4, c. 123, it is sufficient to allege that the prisoner forged a promissory note for ——*l.*, without stating the date ; but where the forgery is on a joint-stock bank, quære, if the intent must not be laid to defraud the parties returned under 7 Geo. 4, c. 46, to the Stamp-office, and such return be produced? (*Rex* v. *Burgiss*, 1836, N. P., 7 C. & P. 490; S. P. *Rex* v. *James*, 1836, N. P., 7 C. & P. 553). Indictment for uttering a forged bill of exchange set out, " A 4 mois de date, par cette lettre de change, à l'ordre de nous-même la somme de 500 livres sterling," and translated, " At four months' date, by this bill of exchange, to the order of ourselves the sum of 500*l.* sterling:"—Held good. (*Rex* v. *Szudurskie*, 1835, 1 Moody, C. C. 429). Where the prisoner, after 1 Will. 4, c. 66, was charged on different counts with " forging," " uttering," and with " offering and disposing:"—Held, that the indictment was not vitiated by the introduction of the terms of the old enactments, not now in force; (*Rex* v. *Brewer*, 1834, N. P., 6 C. & P. 363); but an indictment for forging a receipt at the foot of an account, signed with initials only, there being no averment to shew their meaning, and that it meant a party to whom the money might have been paid:—Held insufficient. (*Rex* v. *Barton*, 1826, 1 Moo. C. C. 141). A count, alleging the uttering a forged bill and acceptance:—Held, not to be supported by evidence, that the acceptance only was forged;—Held, also, that a count alleging that the prisoner, having in his possession a certain bill with a forged acceptance, uttered the said bill with intent &c., was bad. (*Rex* v. *Horwell*, 1833, N. P., 6 C. & P. 148; S. C. 1 Moody, C. C., 405). Where several were engaged in a system of forging bills on bankers:—Held, that each individual taking was liable as a principal in the felony, and that the ignorance as to who were to effect the other parts of the forgery was immaterial; it was sufficient if they knew it was to be executed by some one. (*Rex* v. *Kirkwood*, 1831, 1 Moo. C. C. 304; S. P. *Rex* v. *Dade*, 1 Moo. C. C. 307; S. P. *Rex* v. *Bingley*, Russ. & Ry. 446). So, where several are jointly indicted for using plates of forged notes, the jury must be satisfied of all being present or assisting at an act of issuing; and it is not sufficient to shew their singly using the plates, or acting as criminal dealers in such notes, or individually in possession of them; but held, that the indictment, setting out as a translation of foreign notes the word " guilder," was a sufficient English word, as translating the foreign word corresponding; but that the counts which omitted to set out marginal words, denoting the year of issuing, and without which the notes could not be circulated in the foreign country, was insufficient. A description of a foreign note in the English language only would be bad on special demurrer, but cured after verdict, provided the description be in the words of the statute creating the offence. Sewing the forged notes to the parchment on which the indictment is engrossed:—Held, not a legal mode of setting out the instruments. (*Rex* v. *Harris*, 1835, C. C. C., 7 C. & P. 416; Id. 429). Three prisoners (foreigners) were indicted for feloniously engraving and making two parts of a promissory note of the Emperor of Russia. The indictment was framed upon the stat. 11 Geo. 4 & 1 Will. 4, c. 66, s. 19. The plates were engraved by an Englishman, who was an innocent agent in the transaction. It appeared that two of the prisoners only were present at the time when the order was given for the engraving of the plates, but they said they were employed to get it done by a third person; and there was some evidence to connect the third prisoner with the other two who gave the order for the engraving.

husband, though payable to the wife before marriage.

A. B.; but he directed the jury to find the prisoner guilty, and reserved the point.

Lord *Denman*, C. J., Mr. Justice *Park*, Mr. Baron *Bolland*, and Sir *John Cross* being of opinion that the conviction was right, the prisoner was sentenced to transportation for seven years.

III. RELATIVE TO THE EVIDENCE*.

Regina *v.* Farr, 1839. N. P. 8 *C. & P.* 768.

On an indictment for forg.

On a charge of forgery of a bill, a witness for the prosecution stated, on his cross-examination, that he went with the prisoner to

The questions left to the jury were, 1st, whether the two who gave the order knew the nature of the instrument; and 2dly, whether all three concurred in the order given. The judge told the jury that, in order to find all three guilty, they must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and that all three concurred in the employment of the engraver. His lordship also said that he was inclined to think, that if the prisoners, by means of the engraver, caused the plates to be engraved, they would be within the provisions of the statute, whether they knew the nature of the instrument engraved or not; but intimated, that if it became necessary, that matter might be made the subject of further consideration. The jury found the two guilty who gave the order, and added, that they considered they knew the nature of the instrument; the third prisoner was acquitted. (*Reg.* v. *Mazeau*, 1840, C. C. C., 9 C. & P. 676).

* Where the prisoner, being himself the payee of the note uttered, stated that W. H., of B., was the maker:—Held, that it was sufficient for the prosecutor to shew that it was not the note of that person, and that it lay on the prisoner to prove it to be the genuine note of another W. H., if it were so. (*Rex* v. *Hampton*, 1830, 1 Moo. C. C. 255). So, where a bill purported to be accepted by "Samuel Knight, Market-place, Birmingham;" it was held, on an indictment for the forgery of the acceptance, that the result of inquiries made at Birmingham by the prosecutor, who was not acquainted with the place, was evidence for the jury, though neither the best nor the usual evidence given, to prove the non-existence of a party whose name is used. (*Rex* v. *King*, 1832, O. B., 5 C. & P. 123). On an indictment for forging a will, written apparently over pencil writing before rubbed out, the evidence of an engraver, in the habit of looking at minute lines on paper, held admissible as to the existence of such pencil marks, which he had examined with a microscope. (*Rex* v. *Williams*, 1838, C. C. C. 8 C. & P. 434). On an indictment for uttering a forged cheque on bankers, army agents, in the name of W.:—Held, that calling a clerk of the agents to state that, from his own knowledge, and inquiry of other persons in the house, there was no such customer as W., was sufficient primâ facie evidence for the jury. (*Rex* v. *Brannan*, 1834, O. B., 6 C. & P. 326). Upon an indictment for putting away forged notes of the Royal Bank of Scotland:—Held, that it was not necessary to shew an express authority to draw and issue such notes, the power being recognized by 48 Geo. 3, c. 149, and 55 Geo. 3, c. 184. (*Rex* v. *M'Keay*, 1826, 1 Moo. C. C. 130). Where the prisoner was examined on oath before commissioners of bankruptcy, having been cautioned to elect what questions he would answer:—Held, that such depositions were admissible against him on a charge of forgery. (*Reg.* v. *Wheater*, 1837, 2 Moo. C. C. 45). In order to prove the knowledge, on an indictment for forging and circulating forged Polish notes:—Held, that conversations between the parties as to the forgery and circulation of forged Austrian notes were admissible. (*Rex* v. *Harris*, 1836, C. C. C., 7 C. & P. 429). Upon a charge of uttering forged notes, in order to shew the guilty knowledge, *Gaselee*, J., received evidence of uttering (subsequent to the act under inquiry) of bills precisely similar, as to the names of drawers and acceptors, which were also forgeries; (*Rex* v. *Smith*, 1830, O. B., 4 C. & P. 411); but the prosecutor cannot give secondary evidence of the forged deed, unless he has given the prisoner notice to produce it, and notice at the assizes is insufficient; but if the prisoner has declared it to be destroyed, no notice is necessary. (*Rex* v. *Haworth*, 1830, N. P., 4 C.

the prosecutor, who took the bill, and returned it to the prisoner, with his name on it. The counsel for the prosecution suggested that this was untrue, and that the witness had not stated this before the magistrate, and had made different statements to other persons; and the counsel for the prosecution wished to cross-examine this witness.

ery, a prosecutor cannot cross-examine his own witness.

Patteson, J.—I cannot allow you to do that; he is your witness, and you must treat him as such.

IV. RELATIVE TO THE WITNESSES.

BLOOR *v.* DAVIES, M. T. 1840. Ex. *7 M. & W.* 235.

THIS was an action of debt on a bond, in the penal sum of 2000*l.*, and was brought against the defendants, as the devisee and heir of Thomas Bloor, deceased. The defence being that the testator's signature to the bond was a forgery—

A party claiming under a will is not a competent witness on a question of forgery*.

The Court held, that an annuitant under the will of the testator, which charged the annuity on the real estate, was not a competent witness for the defendant.

V. RELATIVE TO THE PUNISHMENT†.

Formedon. See tit. *Right, Writ of.*

Franchise. See tit *Corporation.*

Frauds and Cheats. See tits. *False Pretences—Indictment.*

& P. 255). However, the grand jury may receive secondary evidence of the contents of the forged instrument, where, from its being in the hands of the prisoner, or any other cause, it cannot be produced, and where a witness objects to produce deeds, if they are part of the evidence of the title to his estate, he cannot be compelled to produce them, but if not he may. *Rex* v. *Hunter*, 1829, N. P., 3 C. & P. 591).

* Before the recent statute, for forging a joint acceptance:—Held, that a release to the acceptors jointly, on a single stamp, was sufficient; and if a release had been given to one only of two joint acceptors, it would have enured to the discharge of both. (*Rex* v. *Bayley*, 1824, N. P., 1 C. & P. 435).

The party whose name has been forged rendered a competent witness by 9 Geo. 4, c. 32, s. 2; and every punishment for felony, after having been endured, to have the effect of a pardon under the great seal, but not to affect the punishment to which the offender may be subject on a second conviction. (*Banks* v. *Kain*, H. T. 1827, N. P., 2 C. & P. 597).

† See 1 Will. 4, c. 66; 1 Vict. c. 84.

The 7 Geo. 2, c. 22, s. 1, was not repealed by the 45 Geo. 3, c. 89, s. 1. After the latter statute, uttering a forged acceptance was punishable under the former. (*Rex* v. *Mather*, 1830, 1 Moo. C. C. 291).

Frauds, Statute of.

See, also, tit. *Guarantee.*

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I. RELATIVE TO WHAT CONTRACTS OR UNDERTAKINGS IN GENERAL ARE WITHIN THE STATUTE OF FRAUDS.

Eastwood *v.* Kenyon, H. T. 1840. Q. B. 3 *P. & D.* 276.

To bring the promise to pay the debt of another within the statute, it must be made at the request of the party,

The declaration stated that the plaintiff had expended money in maintaining an infant, and improving her property, having for that purpose borrowed a certain sum from B., to whom he had given his promissory note as a security; that the infant, after she came of full age, promised to pay the note, and that the defendant, her husband, who had the benefit of the expenditure, promised the

plaintiff to pay the note; and alleged as a breach that he had not done so. sought to be charged.

The Court held, that the declaration did not contain any legal consideration for the promise; that it stated nothing but a past benefit, which was not conferred at the request of the defendant; and, therefore, that it was bad in arrest of judgment.

See French v. *French*, 2 *M. & G.* 644; *S. C.* 2 *Scott, N. S.* 121.

PAWLE *v.* GUNN, E. T. 1838. C. P. 4 *Bing. N. S.* 445.

THE plaintiff, at the defendant's request, entered into a contract for the purchase of Spanish bonds, and afterwards paid the price, which the defendant promised to repay. In assumpsit for money paid— An executory contract on which money has been paid is not within the Statute of Frauds.

The Court held, that the defendant could not object that the executory contract on which the money had been paid was not in writing as required by the Statute of Frauds.

EDWARDS *v.* KELLY, E. T. 1817. K. B. 6 *M. & S.* 204.

THE plaintiff having distrained goods for rent, which the defendant was about to sell, the defendants gave an undertaking, that if he would give up the distress, and allow them to sell the goods for the tenant, they would pay the rent legally due. A promise to pay, on consideration of withdrawing a distress,

The Court held, that it was not a promise to answer the debt of another within the Statute of Frauds, but an independent undertaking and a fresh consideration of putting the goods into the hands of the defendants by the plaintiff, subject to that trust.

BIRD *v.* GAMMON, M. T. 1836, C. P. 3 *Bing. N. S.* 883.

THE defendant had taken the stock of a party and undertaken to satisfy the creditors; the plaintiff agreeing to withdraw his execution, which he had issued. or an execution, is not within the statute.

The Court held this to be an original and not a collateral undertaking for the debt of another within the statute.

ADAMS *v.* DANSEY, T. T. 1829. C. P. 6 *Bing.* 506; S. C. 4 *M. & P.* 245.

THE plaintiff, an occupier, at the request of the defendant resisted a suit by the vicar for tithes, upon a promise to repay him all costs which might be paid by him. So, a parol promise to indemnify an occupier who resists a suit for tithes, and payment by plaintiff by a note suffices);

The Court held, that it was not a promise for the debt, default, or miscarriage of another within the statute, so as to make it necessary it should be in writing, and might be available for the costs antecedently incurred:—Held, also, that a payment of the costs by the plaintiff's attorney to the vicar was a payment by his agent, and it was immaterial in what way the latter settled this account with his principal; it was no objection, therefore, that the plaintiff had only repaid him by giving him a promissory note for the amount.

See Lesenbery v. *Evans*, 3 *Scott, N. R.* 476.

JARMAIN *v.* ALGAR, H. T. 1826. N. P. 1 *Ry. & M.* 348.

IN an action on an undertaking to sign a bail-bond, "when tendered within a week from the date," the declaration averring a or an undertaking to execute a bail-bond in

a week, is not within the Statute of Frauds;

tender and refusal; but it was only proved that the defendant was requested to execute a bond, and refused, but that no bond was produced or tendered until after the week had expired—

The Court held, that such undertaking was not a case within the Statute of Frauds, as an undertaking to answer for the debt, default, or miscarriage of another; and that the failure in proof of the tender was fatal.

GREEN *v.* CRESWELL, H. T. 1840. Q. B. 2 *P. & D.* 430.

but a verbal promise to indemnify a person becoming bail is not binding.

IN assumpsit, it appeared that a writ of capias ad respondendum having been issued against Hadley at the suit of one Reay, the former applied to the defendant, an attorney at Birmingham, and that, at the request of the defendant, the plaintiff agreed to become bail to the plaintiff for Hadley, on the verbal promise of the defendant to indemnify him. It was proved that the plaintiff executed the bail-bond; that Hadley failed to put in special bail; that the plaintiff was sued on the bond; and that execution having issued against him, he paid the sum of 98*l.* It was contended, for the defendant, that this was a promise within the Statute of Frauds.

The Court held that an agreement to save a party harmless, if he will become bail to the sheriff for a third person, is a promise to answer for the "debt or default" of another within the 4th section of the Statute of Frauds, and must be in writing.

II. RELATIVE TO CONTRACTS FOR THE SALE OF LAND* OR INTEREST IN LAND.

(*a*) WHAT CONTRACTS WITHIN THE STATUTE.

JONES *v.* FLINT, E. T. 1840. Q. B. 2 *P. & D.* 594.

Although a contract might, per se, convey an interest in land, still other matters may exclude it from the operation of the statute.

IN an action of assumpsit, it appeared that the defendant agreed by parol, in August, for a crop of growing corn, and the profit of the stubble afterwards, some potatoes growing, and whatever lay grass was in the fields; but the plaintiff was to have liberty for his cattle to run with the defendant's. The latter was to harvest the corn and dig the potatoes, but the plaintiff to pay the tithes.

The Court held, that the introduction of the lay grass into the contract as a matter of purchase and sale, although, per se, it might be taken to be an interest in land, yet it being consistent with an agisting by the owner of the vendor's cattle, and of the possession of the land still remaining with the former, the objection founded on the statute ought not to prevail.

SCORELL *v.* BOXALL, E. T. 1827. Ex. 1 *Y. & J.* 396.

The sale of growing underwood,

IN trespass, the question was, whether the plaintiff, who had purchased by parol the underwood then standing, to be cut by him, had such a possession as would enable him to maintain trespass

* By 29 Car. 2, c. 3, s. 4, "No action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

against the defendants for cutting and carrying it away. The learned Judge was of opinion that the sale came within the 4th section of the Statute of Frauds, and was void, there being no note or memorandum in writing, pursuant to that statute; upon which the plaintiff was nonsuited.

The Court held, that the sale of growing underwood, to be cut by the purchaser, confers an interest in land under the 4th section of the Statute of Frauds, 29 Car. 2, c. 3.

EARL OF FALMOUTH *v.* THOMAS, M. T. 1832. Ex. 1 *C. & M.* 89; S. C. 3 *Tyrw.* 26.

or a contract to take a farm for a term, with the crops, &c, is an interest in land within the statute;

IN assumpsit, upon an agreement that, in consideration of the plaintiff letting a farm to the defendant for a term, he would take the crops, and labour and materials expended, at a valuation—

The Court held, that such agreement was a contract for an interest in land within the Statute of Frauds; and that the objection of its not being in writing applied equally to the counts for the crops as for the labour, and also an account stated, upon pleas shewing that the causes of action in such counts respectively arose out of such agreement.

SAINSBURY *v.* MATTHEWS, M. T. 1838. Ex. 4 *M. & W.* 343; S. C. 7 *D. P. C.* 23.

but a parol contract to purchase potatoes then growing, and to have them at digging time, and find diggers, not a contract within the section.

AN agreement was made in June to sell the produce of 100 lays of land, planted with potatoes, at 2*s.* a sack, the buyer to have them, and pay for them at picking-up time, and to find diggers. On the question whether such a contract was "an interest in or concerning land," required to be in writing by the Statute of Frauds—

Per Cur.—We think that this is nothing more than a contract for the sale of goods and chattels at a future day, which gives no interest to the purchaser in the land. If, between the time of the contract and the usual time for the potatoes coming to maturity, a tempest had destroyed them all, the loss would clearly have been the defendant's, and he would have to receive no money. In *Evans* v. *Roberts*, (5 B. & C. 329), there was some colour for saying that the terms of the contract comprised an interest in land; but it was held, after discussion, that it was not a case within the 4th section of the statute; much less can this be said to be so, where the potatoes are to be sold by the sack.

See 5 *Bing.* 46; 6 *Scott*, 733.

MECHELLEN *v.* WALLACE, T. T. 1837. Q. B. 2 *N. & P.* 224.

An agreement for a demise of a house, to be furnished, &c., is an interest in land within the Statute of Frauds.

THE declaration stated that the plaintiff was desirous, and intended to hire and take, as tenant, a furnished house and premises, for a ladies' boarding-school; that the defendant was possessed of a house partly furnished, and was desirous that the plaintiff should take and hire that house and furniture, at the rent of 170*l.* for the house and furniture, and all other furniture necessary for completely furnishing the same; and thereupon, in consideration that the plaintiff would take possession of the house so furnished, and would, if the furniture necessary for the completely furnishing the same should be sent into the said house within a reasonable time, become the

tenant to the defendant of the said house and premises, with all the furniture aforesaid, at the rent aforesaid, and pay the rent from a day agreed upon; the defendant, within a reasonable time after the plaintiff should have so taken possession of the said house and premises, to send into the house all the furniture necessary for the completing of the furnishing of the house, of good quality, and suited to the purpose. It appeared that the plaintiff agreed, by parol, to take the house, which was partly furnished, and was to be completely furnished by the defendant, at a certain rent.

The Court held, that the agreement related to an interest in land; and, as there was no memorandum in writing, the action could not be maintained.

EDGE *v.* STRAFFORD, E. T. 1831. Ex. 1 *C. & J.* 391; S. C. 1 *Tyrw.* 293; *Abr., post,* tit. *Use and Occupation.*

A parol agreement to take lodgings "for two or three years" is void by the Statute of Frauds;

UPON an agreement by parol to take lodgings "for two or three years," to enter on a future day, before which, the defendant, upon inspecting them, declined taking them and never entered—

The Court held, that it was an agreement for an interest in land within the Statute of Frauds, s. 4.

HALLEN *v.* RUNDER, T. T. 1834. Ex. 1 *C., M. & R.* 266; S. C. 3 *Tyrw.* 959.

but a purchase of fixtures is not a contract for any interest in land under sect. 4.

THE tenant, on the expiration of his term, was about to remove fixtures, to which he was entitled, but was requested by the landlord to forbear, he agreeing to take them at a valuation; which was afterwards, and after the time expired, made and signed by two brokers.

The Court held, that it was not a sale of any interest in land within sect. 4 of the Statute of Frauds, requiring a note in writing.

(*b*) OF THE NOTE OR MEMORANDUM.

DOBELL *v.* HUTCHINSON, T. T. 1835. K. B. 5 *N. & M.* 251; S. C. 3 *Ad. & E.* 355.

The contract may be created by taking several documents together.

THE vendee signed a contract on the back of the conditions of sale; but there was no signature by the vendors, or by any one on their behalf.

The Court held, that letters written subsequently by one of the vendors, in which he referred to the sale to the vendee and to the conditions of sale, were sufficient to take it out of the Statute of Frauds.

LAYTHOARP *v.* BRYANT, E. T. 1836. C. P. 2 *Bing. N. S.* 735.

A vendee is bound by signing a memorandum on the particulars to the conditions of sale of land,

THIS was an action against the purchaser of certain premises at a sale by auction, to recover the difference between the price at which he had been declared the purchaser, and the sum for which they had been re-sold, together with the expenses of the re-sale. It appeared on the trial that the defendant signed a memorandum of agreement for the purchase at the time of the sale, but that such memorandum

was not signed by the plaintiff, or any person on his behalf. A verdict having been given for the plaintiff—

at an auction, although not signed by the vendor.

The Court held, that the note or memorandum in writing of agreement of sale, containing the names of the seller and agent, price, conditions of sale, &c., and all other things required by the Statute of Frauds, is not rendered invalid under the 4th section, by being signed by the defendant alone, he being, according to the meaning of the section, the party to be charged.

III. RELATIVE TO CONTRACTS FOR THE SALE OF GOODS*.

(*a*) What contracts within the statute.

Humble *v.* Mitchell, M. T. 1839. Q. B. 3 *P. & D.* 141.

An agreement for shares in a banking company is not a contract for "goods, wares, &c." within the Statute of Frauds†.

The contract was to deliver the shares on the 4th of August at 2*l.* 7*s.* 6*d.* per share, and it was not fulfilled on that day; the shares were quoted at 2*l.* 10*s.*, but the plaintiff was unavoidably absent from the share market. No more transactions in shares took place until the 10th, when they bore the price of 3*l.* 10*s.* The jury gave as damages the difference between the contract price and that of the 10th of August.

The Court gave no opinion as to the measure of damages; and said, a contract for the sale of shares in a joint-stock banking Company, is not a contract for the sale of goods, wares, or merchandize, within the 17th section of the Statute of Frauds.

Evans *v.* Roberts, T. T. 1826. K. B. 5 *B. & C.* 829; S. C. 8 *D. & R.* 611.

So, potatoes to be raised from the ground by seller are goods, and not an interest in land.

Assumpsit for crops of potatoes bargained and sold by plaintiff to defendant. The plaintiff proved a bargain made between himself and the defendant for the sale and purchase of a crop of potatoes then growing in the plaintiff's ground. It was part of the agreement that the plaintiff was to turn them up at the request of the defendant. A shilling was paid in earnest. The defendant's counsel objected, that this was an agreement for the sale of an interest in land; and therefore, not being in writing, it was void by the Statute of Frauds, 29 Car. 2, c. 3, s. 3.

* By 29 Car. 2, c. 3, s. 17, "No contract for the sale of any goods, wares, or merchandize, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." By 9 Geo. 4, c. 14, s. 7, the enactments of the 29 Car. 2, c. 3, s. 17, and of the Irish Act, 7 Will. 3, c. 12, are to extend to all contracts for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be required for the making or completing thereof, or rendering the same fit for delivery.

† Agreement to furnish chimney-pieces, and "to finish them in a tradesman-like manner:"—Held, to be a contract for the sale of goods, and the agreement not to require a stamp, and that something remaining to be done before delivery made no difference. (*Hughes* v. *Breeds*, 2 C. & P. 159).

The Court held, that a contract for the sale of growing crops of potatoes, to be dug up by the seller, is not a contract for the sale of an interest in land, so as to require a note in writing to satisfy the Statute of Frauds.

See 11 *East*, 362; 2 *M. & S.* 205.

SMITH *v.* SURMAN, E. T. 1829. K. B. 9 *B. & C.* 561.

And a contract for the purchase of felled trees does not convey an interest in land, but in goods, within the 17th section of the Statute of Frauds.

IN an action for not accepting goods, it appeared there was a parol agreement by defendant to purchase ash-trees, which the plaintiff was felling, at 1*s.* 6*d.* per foot; the defendant would not take them away, objecting that they were faulty and unsound; the plaintiff's attorney afterwards required him to pay for the timber he had purchased at that price, to which the defendant replied by letter, that he bought the timber to be sound and good, which the plaintiff "promised to make it so, and now denies it, and which I have some doubts whether it is so or not. He told me I should not have any without all; so we agreed on these terms, and I expected him to sell it to somebody else."

The Court held, 1st, that it was not a contract for the sale of any interest in lands, but for the sale of goods, wares, and merchandize, within the 17th section of the statute; 2ndly, that, as the defendant's letter did not recognize the absolute contract stated in the plaintiff's attorney's letter, but a conditional one, and which might be denied by the plaintiff, there was not a sufficient note in writing to satisfy the statute.

WATTS *v.* FRIEND, H. T. 1830. K. B. 10 *B. & C.* 446.

A contract to furnish seed to the defendant, to be sown by him, and the crops sold to plaintiff at a fixed sum per bushel, is an agreement within the Statute of Frauds.

IN assumpsit, the declaration stated, that, on the 28th of May, 1827, the plaintiff contracted and agreed with the defendant to buy of him, and the defendant agreed to sell to the plaintiff, the whole of his turnip-seed, which should be produced from certain plants then growing on lands of the defendant, at the price of one guinea per bushel, (Winchester), and to be delivered to the plaintiff at the usual time after the same should be harvested and threshed; that the seed produced from the said plants was afterwards harvested and threshed, and the produce amounted to divers, to wit, thirty quarters. It appeared that the defendant agreed to supply the plaintiff with a quantity of turnip-seed, and plaintiff agreed to sow it on his own land, and sell the crop of seed produced therefrom to A. at 1*l.* 1*s.* the Winchester bushel; and the seed so produced at the price agreed upon exceeded in value the sum of 10*l.*

The Court held, that this contract was within the 17th section of the Statute of Frauds, and void for want of a memorandum in writing.

(*b*) OF THE NOTE OR MEMORANDUM.

HEMMING *v.* PERRY, T. T. 1828. C. P. 2 *M. & P.* 375.

A contract may be created by taking a num-

THE defendant by letter agreed to take fixtures at an appraisement, and named S. as his appraiser; the plaintiff's appraiser and S. having met, but disagreeing, appointed an umpire, who completed

the valuation; but the defendant, under pretext that he had not authorized such umpirage, refused to take the goods until after they had been removed, when he gave notice that he was ready to pay the amount as settled by the appraisers.

ber of documents together.

The Court held, that taking the correspondence and inventory and appraisement together, it amounted to a sufficient agreement within the statute; and that, considering the whole correspondence as taken together to form the contract, the whole was admissible, a stamp being affixed to the original letter.

RICHARDS *v.* PORTER, E. T. 1827. K. B. 6 *B. & C.* 437.

A letter, complaining of the non-arrival of goods, is not a sufficient memorandum.

IN an action for not accepting goods, the only evidence of a contract for the sale of hops was a letter acknowledging the receipt of the invoice, but stating, that the goods had not arrived, nor had he (the defendant) heard of them; adding, "however, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them."

The Court held, that even connecting it with the invoice, it was not a sufficient memorandum of the contract sufficient to satisfy the statute.

See Cooper v. *Smith,* 15 *East,* 103.

SNELLING *v.* HUNTINGFIELD, T. T. 1834. EX. 1 *C., M. & R.* 20; S. C. 4 *Tyrw.* 606.

A contract drawn up but not signed by either party, though the tenant enters, is not a sufficient memorandum within the statute*.

ON 20th July, upon a proposal by the defendant to hire the plaintiff as a farm bailiff, a memorandum was drawn up as to the allowance, salary, &c., which was not signed by either, but taken away by the plaintiff, and he entered into the service on the 24th, but quitted before the end of the year upon a month's warning. In an action as and upon a contract to continue the plaintiff in his service for a year —

The Court held, that, as the contract was to commence on the 24th, and not being to be performed within the year, no action could be maintained for want of being in writing and signed.

GRAHAM *v.* MUSSON, T. T 1839. C. P. 5 *Bing. N. S.* 603; S. C. 7 *Scott,* 769.

An agent must be authorized as such under the Statute of Frauds.

THE traveller of the plaintiffs sold M., the defendant, thirty mats of sugar on account of the plaintiffs, and at the desire and in the presence of the defendant made and signed an entry of the contract in a book produced by the defendant, and kept by him for his own use, in the following terms:—"Of North & Co., thirty mats of Maurit., &c., 71*s.* cash. Two months. Fenning's Wharf, August 19, 1836. Joseph Dyson." The sugar was sent to the wharf, and an invoice was transmitted to the defendant, apprising him that it was to be sent by a certain ship. Whilst at the wharf the sugar was destroyed by fire.

The Court held, that the entry made and signed by the plaintiffs'

* Where the memorandum was signed only with the initials of the vendor, the name of the vendor no where appearing, and a subsequent letter by the vendee in no way referring to the memorandum:—Held, not a sufficient one within the statute. (*Jacob* v. *Kirk,* 1839, N. P., 1 M. & Rob. 221).

traveller in the defendant's book, by his desire and at his request, did not constitute a note or memorandum in writing within the 17th section of the Statute of Frauds; the traveller not being the defendant's agent thereunto lawfully authorized.

GOSBELL *v.* ARCHER, H. T. 1835. K. B. 4 *N. & M.* 485; S. C. 2 *Ad. & E.* 500; S. C. 2 *Bing. N. S.* 501.

An auctioneer's clerk is not merely as such an agent duly authorized;

IN assumpsit, it appeared that, on the sale of property by auction, the purchaser paid the deposit-money pursuant to the conditions of sale, and half the auction duty, for which he had a receipt signed by the clerk of the auctioneer. The purchaser at the same time signed a memorandum of agreement at the back of the particulars and conditions of sale for the payment of the remainder of the purchase-money at a future time. This agreement was also signed by the auctioneer's clerk, professedly as a witness. Subsequently to the auction, it being found that the vendors could not make out a marketable title, the attornies of the vendor wrote a letter to the attorney of the vendee, in which they admitted that they could not make out a title to this property, and that, if the purchaser would not take it as it appeared upon the abstract, the better way would be for him to relinquish the purchase.

The Court held, that this letter could not be considered as any recognition of the authority of the auctioneer's clerk to sign the agreement for the vendor, and that the purchaser therefore could not recover back the expenses of investigating the title.

JOHNSON *v.* HODGSON, T. T. 1839. Ex. 2 *M. & W.* 97.

but the plaintiff's traveller is a sufficient agent.

THE plaintiff's traveller took the defendant's order for hops, the terms of which the latter entered in his own sample book, containing his own name, and which the traveller signed on behalf of the plaintiff.

The Court held this a sufficient memorandum of the contract within the statute.

HOADLY *v.* M'LAINE, E. T. 1834. C. P. 10 *Bing.* 482; S. C. 4 *M. & Scott,* 340.

The memorandum in writing need not state the price.

THE defendant gave the plaintiff an order for a carriage, to be completed at a future time, no reference or allusion was made to any specific price subsequently to the completion of the work and approval of it by the defendant. He wrote a letter to the plaintiff, desiring it to be sent home with the bill. In an action against him for non-acceptance—

The Court held, that the letter, coupled with the order, constituted a sufficient memorandum in writing of the bargain under 9 Geo. 4, c. 14, s. 7, though such letter and order were silent as to price, and that the party was entitled to recover on the quantum valebat.

THOMAS *v.* WILLIAMS, E. T. 1830. K. B. 10 *B. & C.* 664.

An entire contract, void as to part, is void altogether.

A DEBT being due from a tenant, and the latter about to sell his goods, the landlord went to the premises in order to distrain. The auctioneer then verbally promised, that if the landlord would forbear to distrain, he would pay not only the rent then due but the rent

then accruing, and which would become due at the end of the current half-year. The landlord upon this promise forbore. In an action against the auctioneer upon this promise—

The Court held that, although a promise to pay the rent for which the landlord could then legally distrain might be supported up to the value of the goods, yet the promise to pay for the rent not then due was within the Statute of Frauds, and was void for want of a note in writing; and being void in part, it could not be enforced at all, even for the rent due at the time.

(*c*) Of the acceptance.

BENTALL *v.* BURN, M. T. 1824. K. B. 3 *B. & C.* 423; S. C. 5 *D. & R.* 284.

There is no acceptance of goods until the buyer has control over them*.

DECLARATION in assumpsit for goods bargained and sold before the time of the respective bankruptcies. It appeared that, on the 15th of February, the following delivery-order, together with an invoice, was sent to the defendant:—"London, 15th February, 1822. To the Superintendent of the London Docks. Please to deliver to Burn & Ormston the undermentioned goods, entered by Baker & Co., in the month of July, 1821, for the ship Sicily, Captain Cupper, from Syracuse, mark S., No. 39, one hogshead of wine." It also appeared, that a delivery-order did not entitle a person to taste the wine, but that a transfer ticket did, and that a delivery-order was seldom given except when it was intended that a delivery should immediately be made.

By the Court.—We are of opinion, that there was not an acceptance within the Statute of Frauds; for there was no possession whatever given to the defendant. The delivery-order did not even entitle him to taste the wine. There should be such an acceptance as would give the buyer some control over the goods sold.

WILLIAMS *v.* BURGESS, T. T. 1839. Q. B. 2 *P. & D.* 422.

Where a mare was sold for 20*l.*, and if in foal to be returned, and part in price repaid:—Held,

THE plaintiff agreed by parol to sell a mare to the defendants for 20*l.*, the defendants agreeing, if the mare should prove to be in foal, to return her to the plaintiff on payment of 12*l.* The plaintiff delivered the mare to the defendants.

The Court held, that this was a simple contract, and that it was not necessary, under the 17th section of the Statute of Frauds, that

* In debt for goods (a fire-engine), upon the question under the Statute of Frauds as to the defendant having accepted it, it appeared, that he had once brought a person to the plaintiff's yard to look at the engine, and being asked what he meant to do with it, he mentioned two or three parties who were likely to want it, and at another time he said he had a concern in the engine:—Held, that if the jury were satisfied that the defendant treated and dealt with it as his own, the plaintiff was entitled to recover. (*Bains* v. *Jervons*, 1836, N. P., 7 C. & P. 288). Acceptance of part of goods made to order not an acceptance within the statute. (*Thompson* v. *Maceroni*, E. T. 1824, K. B., 3 B. & C. 1; S. C. 4 D. & R. 619). But the marking by the vendor of casks of wine, lying in the docks, with the initials of the purchaser, at his request and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance under the 17th section of the Statute of Frauds. (*Proctor* v. *Jones*, M. T., 1826, N. P., 2 C. & P. 532). See as to delivery to a carrier not named by vendee, *Coats* v. *Chaplin*, (2 G. & D. 552).

that the acceptance of the mare took the case out of the statute.

it should be in writing. This is one contract as stated in the declaration, not an agreement for a re-sale, but a sale by the plaintiff to the defendants of the mare on terms to return her if a certain event should happen, the plaintiff returning part of the price. There might undoubtedly have been a difficulty if the contract had been to return the foal instead of the mare, because the article delivered would not have been the same with that which was to be returned.

MABERLY *v.* SHEPPARD, T. T. 1833. C. P. 10 *Bing.* 79; S. C. 3 *M. & Scott,* 436.

Where a chattel is to be made for a party, and he sends part of the materials to the manufacturers, this is not an acceptance.

IN May, 1831, the defendant had ordered a waggon of the plaintiff on the condition that it should be completed by the September following, at the same time telling the plaintiff that, unless it was completed by the 1st of September, it would be of no value to him, and he would not have it. The plaintiff said it should be ready at that time, if not before. The waggon was never out of the plaintiff's possession. Whilst the work was in progress, the defendant sent, at his own expense, other tradesmen to the premises of the plaintiff, who, by his, the defendant's order, affixed to the waggon certain iron work and a tilt.

The Court held, that such operation on the part of the defendant was not within the 17th section of the 29 Car. 2, c. 3, extended by the 9 Geo. 4, c. 14 (which requires the buyer to have accepted part of the goods so sold, and to have actually received the same), the waggon in question never having been out of possession of the plaintiff.

ELLIOTT *v.* THOMAS, H. T. 1838. Ex. 3 *M. & W.* 170.

If part of goods be had according to order, and paid, the acceptance of the goods is sufficient to satisfy the statute.

IN assumpsit, it appeared that, under one parol contract, A. purchased some common steel and some cast steel of more than 10*l.* value. He accepted the former, and paid for it, but refused the latter, not being according to order.

The Court held, that this was a part acceptance within the 17th section of the Statute of Frauds, and made good the contract as to all the steel contracted for.

IV. RELATIVE TO CONTRACTS TO BE PERFORMED WITHIN THE YEAR.

WELLS *v.* HORTON, M. T. 1826. C. P. 4 *Bing.* 40; S. C. 12 *Moore,* 176.

A promise by a debtor that his executors shall pay is not within the statute, the time being contingent.

A TESTATOR stated that he had already provided for the payment of a sum of money by his will, and had directed his executors to pay it.

The Court held, first, that it was binding on his executors; and secondly, where an agreement is to be performed on a contingency, which may happen within the year, and it does not appear on the face of it that it is to be performed after that period, it does not fall within the 4th section of the Statute of Frauds, which requires the

agreement to be in writing, and signed by the party to be charged therewith.

See 3 *Burr.* 1278; *Skin.* 353.

BIRCH *v.* EARL OF LIVERPOOL, E. T. 1829. K. B. 9 *B. & C.* 392.

The Statute of Frauds applies to an agreement for the hire of a carriage for five years at £— per annum.

IN assumpsit on a contract, whereby a coach-maker agreed to let a carriage for the term of five years in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time within that period upon the payment of a year's hire.

The Court held this to be a contract not to be performed within a year, although, by the custom, the hirer was entitled to annul it at any time upon the terms of paying a year's hire, and required, therefore, to be signed by the party to be charged.

V. RELATIVE TO ALTERATIONS OF THE CONTRACT, AND PAROL EVIDENCE TO EXPLAIN.

MARSHALL *v.* LYNN, H. T. 1840. Ex. 6 *M. & W.* 109.—S. P. STOWELL *v.* ROBINSON, M. T. 1836. C. P. 3 *Bing. N. S.* 928.

An alteration as to the time of executing the contract must be in writing.

IN assumpsit on a written contract, which stated time and place for the delivery of the goods, it appeared that the time had been altered by parol.

The Court held the terms of a written contract, which is within the operation of the Statute of Frauds, cannot be altered by parol, and there is no distinction in this respect between the 4th and 17th sections.

See Stead v. *Dawber*, 2 *P. & D.* 447, *infra; overruling Cuff* v. *Penn*, 1 *M. & Selw.* 21.

STEAD *v.* DAWBER, H. T. 1840. Q. B. 2 *P. & D.* 447.

And where the time for executing a written contract fell on a Sunday, and was enlarged by parol:—Held to be void.

IN assumpsit, it appeared that the parties entered into a written contract for the delivery of goods from the 20th to the 22nd of May, to be paid by acceptances at three months from the day of delivery; and the 22nd falling on a Sunday, it was afterwards agreed by parol to substitute the 24th, and enlarge the time for giving the acceptances accordingly.

The Court held, that such extension of the time was of the essence of the contract, and, not being in writing, was void.

GOSS *v.* LORD NUGENT, T. T. 1833. K. B. 2 *N. & M.* 28; S. C. 5 *B. & Ad.* 58.

A contract as to land cannot be varied by

AFTER a written contract on a purchase of several lots of land at a sale, to which a good title was to be made, it was afterwards found that a good title could not be made as to one, but the defendant

parol under the statute*.

agreed by parol to waive the condition as to that lot. In an action to enforce the performance—

The Court held, that, the Statute of Frauds excluding all oral evidence as to contracts for the sale of land, the contract sought to be enforced could be proved by writing only.

VI. RELATIVE TO THE EFFECT OF THE STATUTE†.

VII. RELATIVE TO THE PLEADINGS CONNECTED WITH.

(*a*) Declaration.

Price *v.* Seaman, T. T. 1825. K. B. 4 *B. & C.* 525; S. C. 7 *D. & R.* 14.

After verdict it will be presumed the contract was in writing.

In assumpsit, the declaration alleged, that the plaintiff had bargained with one J. E. for the purchase of certain freehold premises, and that, in consideration of giving up that bargain to the defendant, he promised &c.

The Court held—first, that a writing being essential to the validity of such bargain, after verdict it must be presumed to have been in writing; and secondly, that the giving up such contract in consideration of money was not illegal, but a good consideration for the promise, although the assignee must have sued in the plaintiff's name.—Judgment below affirmed.

(*b*) Pleas.

Maggs *v.* Ames, H. T. 1828. C. P. 4 *Bing.* 470; S. C. 1 *M. & P.* 294.

That the contract was not in writing need not be pleaded‡.

In assumpsit on a promise to pay the debt of a third person, the defendant pleaded—first, that the promise was a special promise for the debt of another, and that no agreement relating to the cause of action, nor any memorandum or note thereof, wherein the consideration for the promise was stated or shewn, was or is in writing, or was or is signed by the defendant, or by any other person by him

* Where an agreement for a lease contained a stipulation for a mode of valuation:—Held, that it was to be taken to be and continue entire; and that such stipulation could not be waived by parol. (*Harvey* v. *Grabham*, 5 Ad & E. 73; abridged, post, tit. *Lease*).

† Upon a question in an issue directed by a court of equity, whether there had been any agreement for the sale of an interest in a lease, &c.:—Held, that a court of law was bound to take notice of the Statute of Frauds, although the court of equity might not, unless the party put himself on the statute; but the fact of an agreement might be found and indorsed as special matter on the postea. (*Burnand* v. *Nerot*, M. T., 1824, N. P., 1 C. & P. 580).

‡ The defence, "no contract in writing," need not be specially pleaded where the contract is executory and relating to an interest in land, (*Buttermere* v. *Hayes*, T. T. 1839, 7 D. P. C. 489; S. C. 5 M. & W. 456); or for goods, (*Eastwood* v. *Kenyon*, 11 Ad. & E. 438; *Fricker* v. *Thomlinson*, 1 M. & G. 772).

authorized; and secondly, the coverture of the original debtor. Demurrer, assigning for cause, that the pleas amounted to the general issue, and tended to prolixity.

Per Cur.—It may be truly said, that, looking through all the law books, there is not a greater variety of opinion upon any question than as to what pleas do or do not amount to the general issue, nor any one upon which there is a greater mass of contradictory decisions. We shall not, therefore, attempt (though we have looked at many of them) to go through or endeavour to reconcile them. We shall satisfy ourselves with saying, that though perhaps the general issue might answer the purpose, it does not therefore necessarily follow that the demurrer on this ground must be allowed, nor that the defendant was bound to give this matter in evidence under the general issue.

See 7 B. & C. 547; *S. C. 7 D. & R.* 42.

(*c*) Evidence.

Acebal *v.* Levy, T. T. 1833. C. P. 10 *Bing.* 376; S. C. 4 *M. & Scott,* 217.

Declaration in assumpsit on a contract for not receiving a cargo "at the then usual and common shipping price at G.:"—Held not to be supported by a memorandum written by the agent to the shipper to consign the cargo to the defendants, but which was wholly silent as to the price; nor could the plaintiffs recover on a quantum valebant, nor for goods bargained and sold for a reasonable price; held also, that the delivery on board, under the circumstances, not precluding the defendants from refusing to receive them if they turned out to be unmerchantable, there was not such an acceptance as to take the case out of the Statute of Frauds.

If the declaration allege the contract to be "at the then usual and common shipping price," when the memorandum itself does not mention the price, it is a variance*.

VIII. RELATIVE TO IRELAND†.

Fraudulent Assignment. See tit. *Bankrupt.*

Fraudulent Conveyance. See tit. *Voluntary Conveyance.*

Freight. See tit. *Charter-Party. See ante, Vol. 2, p.* 553; *and post,* tit. *Ship and Shipping.*

* But see 3 & 4 Will. 4, ante, tit. *Amendment.*

† By 9 Geo. 4, c. 14, s. 7, the enactments of 29 Car. 2, c. 3, and 7 Will. 3, c. 12, (Ireland), extended to contracts for the sale of goods of the value of 10*l.*, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made or ready for delivery.

Friendly Societies*.

See tits. *Savings' Bank—Usury.*

REX *v.* JUSTICES OF SOMERSETSHIRE, H. T. 1833. K. B. 1 *N. & M.* 253.

Before 4 & 5 Will. 4, the 10

ON a rule calling upon the justices of Somersetshire to shew cause why a writ of mandamus should not issue, directed to them,

* By 10 Geo. 4, c. 56, intituled, "An Act for the Encouragement and Relief of Friendly Societies,"—Sect. 1 repeals the 33 Geo. 3, c. 54; 35 Geo. 3, c. 111; 36 Geo. 3; 43 Geo. 3, c. 111; 49 Geo. 3, c. 58; 49 Geo. 3, c. 125; 59 Geo. 3, c. 128; and part of the 6 Geo. 4, c. 74.

Sect. 2. Any number of persons may form themselves into a society, and raise a fund for their mutual benefit, and make rules, &c. Power to alter and amend rules.

Sect. 3. Societies, in their rules, to declare the purpose of their establishment, &c.

Sect. 4. Rules of the society to be submitted to a barrister, or other person, by whom they are to be certified, and deposited with the clerk of the peace. Rules, when certified, to be confirmed by justices at sessions, and a duplicate certified by clerk of the peace. When not necessary to submit rules to barrister.

Sect. 5. Manner of proceeding in case barrister shall refuse to certify.

Sect. 6. Rules not to be allowed unless the justices are satisfied with the tables.

Sect. 7. No society entitled to the benefit of this act unless their rules have been confirmed.

Sect. 8. Rules, when entered and deposited, to be binding on members and depositors. Copy of transcript to be received in evidence.

Sect. 9. No confirmed rule to be altered but at a general meeting of the society, &c.

Sect. 10. Rules shall specify place of meeting and duties of officers. Societies may alter place of meeting.

Sect. 11. Society may appoint officers. Securities to be given for officers of trust, if required. Treasurer or trustees to give bond to the clerk of the peace.

Sect. 12. Appointment of committees. Power of standing committees to be declared in the rules of the society, and of particular ones entered in a book. Committee controllable by society.

Sect. 13. Treasurer or trustees to lay out surplus of contributions, and to bring the proceeds to account.

Sect. 14. Treasurers, &c., to render accounts and pay over balances, &c. And in case of neglect, application may be made to the Court of Exchequer.

Sect. 15. Where trustees, &c., are out of jurisdiction of court, or it be uncertain whether they are alive, or they refuse to convey, &c., Court of Exchequer may appoint a person to convey.

Sect. 16. When trustees shall be absent, &c., courts may order stock to be transferred and dividends paid.

Sect. 17. No fee to be taken for any proceeding in such courts, &c.

Sect. 18. Who shall be named in the orders of the courts for making transfers.

Sect. 19. Act to be an indemnity to the bank.

Sect. 20. Executors, &c., to pay money due to societies before any other debts.

Sect. 21. Effects of societies to be vested in the trustees or treasurers for the time being, who may bring and defend actions.

Sect. 22. Limitation of responsibility of treasurer or trustees. Treasurer, &c., liable for money actually received.

Sect. 23. Payment to persons appearing to be next of kin declared valid.

Sect. 24. For payment of sums not exceeding 20*l.*, where members die intestate.

Sect. 25. Justices may hear cases of fraud, and punish by fine or imprisonment.

Sect. 26. Proceedings necessary for the dissolution of any society. Stock not

commanding them to enrol and confirm the rules of the Friendly Society of Marksbury and Staunton Prior, in the said county, the ques- Geo. 4, c. 6, did not extend to

divisible but for general purposes of the society. Penalties for illegal dissolution or division of funds.

Sect. 27. Rules to be made, directing how disputes shall be settled. Appointment of arbitrators. Justices shall enforce compliance with the decision of arbitrators.

Sect. 28. Reference of disputes to justices, if so directed by the rules of the society.

Sect. 29. Orders of justices to be final.

Sect. 30. Funds may be deposited in savings' bank:

Sect. 31. Or into the Bank of England direct, on receipts; and societies enrolled under 59 Geo. 3, c. 128, prior to 28th July, 1828, so paying in money direct, to be entitled to 3*d*. per cent. per diem.

Sect. 32. Minors may be members, and have legal authority to act.

Sect. 33. Societies shall make annual audits and statements of the funds to the members.

Sect. 34. Returns to be made to the clerks of the peace at certain periods.

Sect. 35. Returns to be transmittted to Secretary of State, and laid before Parliament.

Sect. 36. Penalty on societies not making returns.

Sect. 37. Exemption from stamp duties.

Sect. 38. Construction of words used in this act.

Sect. 39. Act to extend to all present and future societies.

Sect. 40. Societies already enrolled to conform to this act within three years.

Sect. 41. Act a public act.

By 4 & 5 Will. 4, c. 40,—Sect. 1. Repeal of 10 Geo. 4, c. 56, ss. 6, 20, 30; part of ss. 34, 35, 36.

Sect. 2. Purposes for which societies may be formed under 10 Geo. 4, c. 56.

Sect. 3. Repeal of 10 Geo. 4, c. 56, s. 4, and part of s. 7.

Sect. 4. Two transcripts of rules to be submitted to a barrister, &c., by whom they are to be certified. Barrister, &c., to certify both transcripts. Fee payable to barrister. One transcript to be returned to society; the other to be sent to clerk of peace. Justices to confirm rules. Transcript to be filed. Rules, &c., to be binding, when certified by barrister.

Sect. 5. Barrister not to be entitled to fee in respect of alterations within three years, nor for certificated rules, being copies of those already enrolled.

Sect. 6. Returns of sickness, &c., to be sent to barrister.

Sect. 7. If rules of society direct reference in case of dispute to arbitration, and society refuse to grant arbitrators, &c., justices may determine the dispute.

Sect. 8. Provision in case member of society is expelled.

Sect. 9. Funds of friendly society may be deposited in savings' bank.

Sect. 10. Members of friendly societies may be witnesses.

Sect. 11. No fee for oaths before magistrates in obtaining payment of sick pay.

Sect. 12. Executors, &c., of officers of friendly society, to pay money due to society before any other debt.

Sect. 13. Letters to or from barrister and advocate to be free of postage.

Sect. 14. Provisions of former statutes to continue in force as to societies established under them, until they shall conform to the provisions of 10 Geo. 4, c. 56, as hereby amended. If a society enrolled under acts repealed by 10 Geo. 4, c. 56, be desirous of altering their rules, the same to be done in conformity to that statute.

Sect. 15. Construction of words in the act.

Sect. 16. Act may be amended.

Sect. 17. Public act.

And by 3 & 4 Vict. c. 73,—Sect. 1. The 10 Geo. 4, c. 56, s. 37, not to exempt from stamp duty certain friendly societies, when the sum assured exceeds 200*l*.

Sect. 2. No society assuring for more than 200*l*. entitled to invest in savings' banks, or with national debt commissioners.

Sect. 3. Certain friendly societies empowered to appoint nominees to receive sums assured.

Sect. 4. On future investments by societies, a declaration to be made in form directed by commissioners.

Sect. 5. Act may be amended this session.

Sect. 6. Extent of act.

societies existing prior to the act*.

tion for the opinion of the Court was, whether the provisions of the 6th section of 10 Geo. 4, c. 56, applied or extended to societies established before the passing of the 10 Geo. 4, c. 56, (19th June, 1829), and duly enrolled under the statutes then in force.

The Court were of opinion that the provisions of the 6th section of the 10 Geo. 4, c. 56, did not apply or extend to societies established before the passing of that act, but only to societies formed after that time.

REG. *v.* LORD GODOLPHIN, T. T. 1838. Q. B. 3 *N. & P.* 488; S. C. 8 *Ad. & E.* 338.

The new rules of a friendly society must be enrolled.

A SOCIETY, established in 1756, enrolled its rules in 1794. These were altered in 1804 and 1820, but there was no enrolment of the altered rules, upon which, however, the society continued to act. The justices being called upon to adjudicate on a dispute with one of the members, declined to interfere.

The Court refused to grant a mandamus to compel them, holding the new rules to be of no validity, and considering that the old ones must be taken to have been abandoned; and therefore, that the society was not within the stat. 33 Geo. 3, c. 54.

WYBERGH *v.* AINLEY, M. T. 1824. Ex. 1 *M'Clell.* 669.

A bond given to produce box, securities, &c., and to account according to act of Parliament, the latter words do not control the general obligation to produce, &c.

IN an action on a bond given by the defendant, the master of the inn at which the meetings of a friendly society were held, with a condition that he would, when required by a majority of the society, at one of their annual or quarterly meetings, "or by their committee for the time being," produce the box, securities, &c., and likewise would render a just and true account, "according to the rules, orders, and regulations of the said society, and of the said act of Parliament, and those presents."

The Court held, that the latter words did not qualify the power of the committee to demand the box, &c.; but that a refusal to comply with the request of the committee for the time being, and who were shewn to have been duly elected by the majority of the members at an annual meeting, was a breach of the condition.

TYRRELL *v.* WOOLLEY, M. T. 1840. C. P. 2 *Scott, N. S.* 171; S. C. 1 *M. & G.* 809.

The committee have no right to agree to allow a member a fixed sum for life in consideration of his giving up all claim;

A RESOLUTION was passed by the committee of a benefit society, allowing one of the members a certain sum per week for life in consideration of his giving up all claim upon the society. This resolution was communicated to him in a letter signed by two of the committee, and he signed his acceptance of it in the society's book. The weekly sum was afterwards paid for a long period. The payment of it having been discontinued, an action of assumpsit was brought against the two members of the committee for the arrears.

The Court held, 1st, (dubitante, *Maule*, J.), that the committee, according to the rules of the society, had no power to bind the society by any such resolution; and 2ndly, that at all events the

* Although the cases abridged and inserted in the text were decided upon the repealed statutes, still, with reference to the statutes now in force, they may be useful.

action which charged the defendants personally was not maintainable, as it was not upon the face of the contract the intention of the parties that the defendants should be liable personally.

See Tyrrell v. *Woolley*, 2 *Scott, N. R.* 171; *S. C.* 1 *M. & G.* 809.

GARNER *v.* SHELLEY, T. T. 1828. C. P. 5 *Bing.* 477; S. C. 3 *M. & P.* 98.

but, the medical officer to a friendly society, dismissed by incompetent authority, may sue the treasurer for his fees.

BY the rules of a benefit society a medical attendant was to be entitled to a certain allowance for each member, and there was a clause that all disputes, &c. were to be settled, &c. by a committee, subject to an appeal to two justices, and the plaintiff, the medical attendant, having been dismissed by the committee, and another appointed against his consent, and without any meeting of the members at large, but the majority of the members approved of him and still were attended by him, disputes having arisen as to the payment of the plaintiff's successor, upon reference to the jutices they recommended a general meeting, which was accordingly holden, at which the plaintiff was, by a large majority declared to be the surgeon.

The Court held, that the dismissal having been without authority, and the proceeding of the committee not bonâ fide for the investigation of any grievance, the plaintiff was entitled to recover from the treasurer the allowance received from the members for his services, notwithstanding he had paid it over to a wrong person.

SHARP *v.* ASPINALL, M. T. 1829. K. B. 10 *B. & C.* 47.

Under the 49 Geo. 3, c. 125, justices cannot interfere summarily, unless they reside within the county where the society is held.

A FRIENDLY society, formed previous to the 59 Geo. 3, c. 128, was held at Slaidburn, in the West Riding. An aged and infirm member of that society applied to the defendants for a summons upon the officers of the society to relieve him; the defendants heard the complaint, and made an order upon the plaintiff and another person, who were the officers of the society; and that order being disobeyed, they issued their warrant of distress, under which the plaintiff's goods were taken. The 49 Geo. 3, c. 125, s. 1, provides, that two justices, residing within the county, &c. within which such society shall be held, may enforce the observance of the rules of any such society. By sect. 3, it is provided, that if complaint shall be made to two such justices by any member, &c. they may order relief, and in default of disobedience to their order may proceed by distress. It was under this act that the defendants had proceeded and under which they justified. But, although they were both magistrates for the West Riding, only the defendant, Mr. Parker, was resident in that Riding of Yorkshire; the other defendant, Mr. Aspinall, residing in the county of Lancaster, but within two miles of the border of the West Riding of Yorkshire.

The Court held, the power given by stat. 49 Geo. 3, c. 125, s. 3, must be exercised by magistrates residing within the county within which the society is held.

REX *v.* SOPER, H. T. 1825. K. B. 3 *B. & C.* 857; S. C. 5 *D. & R.* 669.

Jurisdiction of the justices is

THE 33 Geo. 3, c. 54, authorizes justices to interfere on complaint by members. The complaint against the stewards of a society stated

confined strictly to the subject-matter of the complaint by the party aggrieved.

only the refusing relief to which the complainant was entitled, and the justices had awarded that the stewards should pay the sum due, with costs, and further, that the party should be continued a member of the society—

The Court held, that the jurisdiction of the magistrates was confined strictly to the subject-matter of the complaint, and that the latter part of such order was illegal and void; and that an indictment, alleging that he had been expelled the society as well as deprived of relief, and that being aggrieved thereby he made complaint thereof, &c., was not supported in evidence by production of the order reciting one ground of complaint only; and that the defendants were entitled to an acquittal on this ground.

DAY *v.* KING, T. T. 1836, K. B. 5 *Ad. & E.* 359.

An order for not paying money over to a member must shew that he is a member, and that the party directed to pay is an officer of the society.

A WARRANT of justices under 33 Geo. 3, c. 54, s. 15, for distress against the goods of the stewards of a friendly society, for refusal by the stewards to pay a certain sum alleged to be due for relief to an individual, who, upon oath, stated himself to be a member, was defective in not adjudicating that he was a member, that the sum awarded was due, and that the parties against whom the warrant issued were the stewards.

The Court would not imply any such adjudication from the recital of the information on which the order was made, in which any of those facts were asserted.

REX *v.* WADE, H. T. 1831. K. B. 1 *B. & Ad.* 861.

In an indictment against the stewards for not obeying the order of justices, it is not necessary to allege that the rules were filed, or that the defendant had the power to restore the party*.

THE Friendly Society Acts provided for the confirming of the rules at the sessions, and the filing them when so confirmed; and that no society should be deemed good under that act until the rules were so confirmed and filed. A subsequent section gave a power to justices to hear the complaint of any member of a society, the rules of which were confirmed under that act, (omitting the words "and filed)." Upon an indictment against the president of a society for not obeying an order of justices to re-admit a member, the words, shewing the authority of the justices, were adopted conformably to the latter section, and did not state that the rules were "filed" as well as confirmed. And, after verdict—

The Court held it to be sufficient. Such an order made upon the president of the society is binding by the 49 Geo. 3, c. 125, s. 4, notwithstanding any arrangement among the members of the society, by which the power to re-admit a member is confined to a commitee.

REX *v.* GILKES, T. T. 1828. K. B. 8 *B. & C.* 439.

On an indictment for disobedience to a justice's order to re-admit an

AN indictment against persons for disobedience of an order of justices to restore a member of a benefit club, stated, that the rules of the club had been duly enrolled at the sessions. The order of the

* A box belonging to a benefit club, which by the rules was to be deposited with the landlord and one of the keys:—Held, to be properly laid, as the property of the landlord, although he had no key at the time of its being stolen. (*Rex* v. *Wymer*, 1830, N. P., 4 C. & P. 391).

As to right to sue, where society not inrolled, see *Bowden* v. *Howell*, 4 Scott, N. R. 331; *Timms* v. *Williams*, E. T. 1842, Q. B.

justices recited that they had been so enrolled, but on the trial of the indictment there being no evidence of the fact, except the recital of the justices themselves—

expelled member, a recital in the order of the enrolment of the rules is not evidence as against the defendant.

The Court held, that the fact which was necessary for the jurisdiction of the justices was not proved. Where a proceeding depends upon the question, whether justices of the peace had or had not jurisdiction over the subject-matter, their own order, reciting a fact which would give them jurisdiction, is not sufficient evidence of the fact.

Funeral. See tits. *Burial—Executors and Administrators.*

Furniture. See tits. *Bankrupt—Distress—Husband and Wife.*

Game *.

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III. RELATIVE TO THE CERTIFICATE, p. 120.

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V. RELATIVE TO THE REMEDIES CONNECTED WITH.

(*a*) By action, p. 121.

(*b*) Informations, p. 122.

(*c*) Convictions, p. 122.

VI. RELATIVE TO DEER STEALING, AND LARCENIES CONNECTED WITH GAME, p. 123.

* By 1 & 2 Will. 4, c. 32, a variety of alterations is introduced as to the game laws, and the prior statutes repealed. By section 1, it is enacted, "That so much of 13 Ric. 2. st. 1, c. 13, as relates to such persons as shall not have or keep any greyhound, hound, or other dog, to hunt, and shall not use fyrets, heys, nets, harepipes, cords, or other engines, to take or destroy hares, conies, or other gentlemen's game; and so much of 22 Edw. 4, c. 6, as relates to the having any mark or game of swans; and also the several acts following:—viz. 11 Hen. 7, c. 17; 19 Hen. 7, c. 11; 14 & 15 Hen. 8, c. 10; 25 Hen. 8, c. 11; 33 Hen. 8, c. 6; 23 Eliz. c. 10; 2 Jac. 1, c. 27; 7 Jac. 1, c. 11; 22 & 23 Car. 2, c. 25; 4 W. & M. c. 23; 5 Ann. c. 14; 9 Ann. c. 25; 8 Geo. 1, c. 19; 10 Geo. 2, c. 32; 26 Geo. 2, c. 2; 28 Geo. 2, c. 12; 2 Geo. 3, c. 19; 13 Geo. 3, c. 55; 13 Geo. 3, c. 80; 39 Geo. 3, c. 34; 43 Geo. 3, c. 112; 48 Geo. 3, c. 93; 50 Geo. 3, c. 67; 58 Geo. 3, c. 75; 59 Geo. 3, c. 102; and all acts continuing or perpetuating any of the acts, or parts of acts hereinbefore referred to, so far only as relates to the continuing or perpetuating the same respectively, shall continue in force until and throughout the 31st of October in the present year, and shall, from and after that day, as to England, be repealed, (except so far as any of the said acts may repeal the whole or any part of any other acts, and except as to any offences which may have been committed against any of the said acts before or upon the said 31st day, which offences shall be dealt with and punished, and the penalties

VII. RELATIVE TO POACHING.

(*a*) What are or are not considered as game, p. 124.

(*b*) Of the offence, p. 124.

(*c*) Of the weapon, p. 124.

(*d*) When jointly or severally guilty, p. 124.

(*e*) Whether murder or manslaughter, p. 125.

(*f*) Remedy connected with.

1. *Of the Indictment*, p. 125.
2. *Of the Evidence*, p. 126.
3. *Of the Conviction*, p. 126.

recovered, as if this act had not been made, and except as to any matters done by any persons under the authority of any of the said acts before or upon the said 31st day, with respect to whom every privilege and protection given by any of the said acts shall continue in force, as if this act had not been made), and this act, shall commence and take effect (except as is hereinafter excepted) on the 1st of November in the present year."

Sect. 2. What shall be deemed game.

Sect. 3. Days and seasons during which game shall not be killed. Penalty for laying poison to kill game.

Sect. 4. Possession of game illegal after ten days in dealers, and forty days in other persons, from the expiration of the season.

Sect. 5. This act not to affect the existing laws respecting game certificates.

Sect. 6. Every certificated person may kill game, subject to the law of trespass. Proviso as to gamekeepers.

Sect. 7. Under existing leases the landlord shall have the game, except in certain cases.

Sect. 8. This act not to affect any existing or future agreements respecting game, nor any rights of manor, forest, chase, or warren.

Sect. 9. This act not to affect any of his Majesty's forest rights.

Sect. 10. Nor to affect any cattle-gates or rights of common. Lord of manor to have the game in the wastes.

Sect. 11. Landlord having the game, may authorize others to kill it.

Sect. 12. Where the landlord &c. has the right to the game, in exclusion of the occupier, the occupier shall be liable to a penalty for killing it.

Sect. 13. Lords of manors may appoint gamekeepers. Powers of gamekeepers in manors.

Sect. 14. Lords of manors may grant deputations.

Sect. 15. Regulations respecting appointment of gamekeepers in Wales.

Sect. 16. All appointments of gamekeepers to be registered with the clerk of the peace.

Sect. 17. Certificated persons may sell game to licensed dealers. Proviso as to gamekeepers.

Sect. 18. Justices to hold a special session, yearly, for granting licenses to persons to deal in game. Dealers in game to put up a board.

Sect. 19. Persons licensed to deal in game must take out a certificate, with a duty of 2*l.*

Sect. 20. Collectors to make out list of persons who have obtained licenses to deal in game.

Sect. 21. Proviso as to partners.

Sect. 22. Licenses, when to become void.

Sect. 23. Penalty for killing game without a certificate. This penalty to be cumulative.

Sect. 24. Penalty for destroying or taking the eggs of game, &c.

Sect. 25. Penalty for selling game without license, and on certificated persons selling to unlicensed persons.

Sect. 26. Exceptions as to innkeepers.

Sect. 27. Penalty on persons buying game except from licensed dealers.

Sect. 28. Penalty on licensed dealers buying game from uncertificated persons, or otherwise offending.

I. RELATIVE TO GRANTS TO KILL GAME.

BIRD *v.* HIGGINSON, H. T. 1835. K. B. 4 *N. & M.* 505; S. C. 2 *Ad. & E.* 669, *confirmed in error*, 6 *Ad. & E.* 824.

IN assumpsit, the declaration stated a special agreement to take a certain messuage, &c., with the right of exclusive shooting over a manor, to hold for a certain time. It alleged, then, that the defendant entered and became "possessed" of the premises for the term granted.

The right to shoot over a manor can only be granted by deed.

The Court held, that the plaintiff could not recover as for use and occupation under this count. The right of shooting over a manor is an incorporeal hereditament, and cannot be granted except by deed.

See Deacon's Game Laws, 60.

MORRIS *v.* DIMES, T. T. 1834. K. B. 3 *N. & M.* 671; S. C. 1 *Ad. & E.* 654.

TO an action of trespass the defendant pleaded, "that Charles I., being seised of the locus in quo, by letters patent granted to the Earl of Pembroke, &c., that they might have free warren, fowling, and hunting," and produced the letters patent, by which were granted "free chase and free warren in all the demesne lands, and land holden by copy of court roll, of the manor of Rickmansworth," &c. The plea then deduced title to the free warren to J. F. and T. D., and alleged that they were seised in fee, and that by indenture of

And under the grant of a manor, a free warren does not pass;

Sect. 29. As to buying and selling game by the servants of a licensed dealer.

Sect. 30. Penalty on persons trespassing, in the daytime, upon lands in search of game. Where the occupier of the land, not being entitled to the game, allows any person to kill it, the party entitled to the game may enforce the penalty.

Sect. 31. Trespassers, in search of game, may be required to quit the land, and to tell their names and abodes; and in case of refusal, may be arrested. Penalty. Party arrested must be discharged, unless brought before a justice within twelve hours.

Sect. 32. Penalty on persons found armed using violence.

Sect. 33. Penalty for trespass in daytime in his Majesty's forests.

Sect. 34. What to be deemed daytime.

Sect. 35. The provisions as to trespassers not to apply to persons hunting, &c.

Sect. 36. Game may be taken from trespassers not delivering up the same when demanded.

Sect. 37. Applications for penalties for offences against this act.

Sect. 38. Time for payment of penalties, and scale of imprisonment for non-payment.

Sect. 39. Form of conviction.

Sect. 40. Power to summon witnesses. Penalty for disobedience of summons, &c.

Sect. 41. Time for proceedings, and mode of enforcing the appearance of offenders.

Sect. 42. Prosecutor not required to prove a negative.

Sect. 43. Convictions to be returned to sessions.

Sect. 44. Appeal.

Sect. 45. No certiorari, &c.

Sect. 46. This act not to preclude actions for trespass, but no double proceedings for the same trespass.

Sect. 47. Venue, &c. in proceedings against persons acting under this act. Tender of amends.

Sect. 48. Act not to extend to Scotland or Ireland.

See the 5 & 6 Will. 4, c. 20, which indemnifies persons prosecuting under the 1 & 2 Will. 4, c. 32.

See Deacon's Game Laws, and Mr. Locke's very useful summary.

lease and release they granted the said free warren to R. W., W. W., and T. L., and then deduced title to defendant. To this the plaintiff replied, taking issue upon the release, and also pleading non concessit. On the production of the lease and release, it appeared to be a conveyance, amongst other things, of "all the manor or lordship of Rickmansworth," &c., "and all other rights, liberties, franchises, &c., hereditaments, and appointments whatsoever, to the said manor and lordship belonging, or in anywise appertaining to or with the same, or any part thereof, then, or at any time theretofore usually held, used, occupied, or enjoyed, &c., or as were in and by the said deed of grant or letters patent granted and assured by the Crown to the said W., Earl of Pembroke, as appurtenant to the said manor or lordship."

The Court held, that, by the letters patent, as pleaded and produced in evidence, a warren in gross was granted, and that the conveyance transferred only the manor and what was appurtenant or appendant to the manor; that the warren in gross, being no part or parcel of the manor, therefore did not pass by that conveyance.

See 3 *Cruise's Dig.* 287; 5 *B. & C.* 883.

WICKHAM *v.* HAWKER, T. T. 1840. Ex. 7 *M. & W.* 63.

but under a grant to A. and B., their heirs and assigns, liberty with servants, &c., the servants may exercise the right in the absence of their master.

THE defendant pleaded to trespass for entering and sporting, 1st, that V. and C., seised in trust for W. of the manor of B., by indenture released part of the demesne lands, comprising the locus in quo, to A., excepting and always reserving to V., C., and W., their heirs and assigns, liberty, with servants or otherwise, to hunt, &c.; and the said A. did thereby grant to the said V., C., and W., their heirs &c., "the said liberty so excepted and reserved"—the plea then deduced title in the defendants from V., C., and W., and justified the trespasses in virtue of the liberty; 2nd, that the defendants, and all occupiers of the said manor, were entitled to use and enjoy the privilege for sixty years, by themselves and servants. Issues were taken on the allegation of such grant, and denied the user and enjoyment; and to a new assignment the replication joined issue.

The Judge held, that the words of reservation &c., in the deed executed by A., operated as a grant by him to V., C., and W.; and that such liberties are interests or profits à prendre, and may be exercised by servants in the absence of their masters. The jury having found that the right had been exercised for sixty years by the occupiers of the manor as such, which the evidence in support of the plea established—

The Court refused, on the suggestion of the intention of the jury being uncertain, to grant a new trial.

PICKERING *v.* NOYES, T. T. 1825. K. B. 4 *B. & C.* 639; S. C. 7 *D. & Ry.* 49.

A grant of the liberty to kill game on Crown lands cannot be presumed.

UPON a plea of a grant by deed of the liberty and privilege by E. C., seised in fee of the locus in quo, to R. W. and his assigns, "being owners of adjoining lands," to hunt with dogs, &c., over the locus in quo, and issue taken on such grant—

The Court held, that being pleaded with a date, and not as a non-existing grant, and the deed produced of that date being a conveyance of the locus in quo by the lord of the manor, "reserving

all royalties," the evidence did not support the plea, and that a mere usage of the liberty, by permission of the tenant, for a long period, was no sufficient ground for a jury to presume any other grant. Another plea stated the conveyance to R. W., with a reservation of all royalties, and deduced title to J. W., and justified entering the closes as the servants &c.:—Held, that upon this issue the defendant was bound to prove strictly that J. W. had such a royalty, and which could only be done by proving first a grant of free warren, or accounting for its loss.

See 3 *Cruise,* 301; 2 *Chit. Burn's Justice,* 1020.

HARPER *v.* CHARLESWORTH, T. T. 1825. K. B. 4 *B. & C.* 574; S. C. 6 *D. & R.* 572.

A party paying rent to the Crown for the right to shoot on Crown land may maintain trespass against a wrong-doer.

IN trespass, it appeared that woods, lands, and the timber thereon, belonged to the Crown, and the plaintiff paid a nominal rent to the Crown for the privilege of shooting the game; and it appeared that a farmer, by leave from him, cut and took away the grass from the sides.

The Court held, that although he took no legal estate from the Crown for non-compliance with the 1 Ann. c. 7, s. 5, and could not therefore have maintained ejectment, nor even have retained possession as against the Crown, yet that he might maintain trespass against a party having no title at all, and a wrong-doer:—Held, also, that payment of the rent, the exercise of the privilege of shooting over the land, and the cutting of the grass by the plaintiff's permission, was sufficient evidence to go to a jury, and for them to find that he was in the actual possession of all but the trees.

II. RELATIVE TO THE TIME AT WHICH GAME MAY BE TAKEN.

SIMPSON *v.* UNWIN, H. T. 1832. K. B. 3 *B. & Ad.* 132.

A person qualified to kill game is not liable to penalties, although he has them in his possession after the time prescribed under 2 Geo. 3, c. 18, and 39 Geo. 3, c. 34.

THE 2 Geo. 2, c. 19, provided "That no person should, on any pretence whatever, take, kill, destroy, carry, sell, buy, or *have* in his possession or use, any partridge," &c. between days therein mentioned; which, by a subsequent act, were altered to the 1st day of February and the 1st day of September, and a penalty of 5*l.* was imposed upon any person who should act against the true intent and meaning of that provision. In debt for penalties under the stat. 39 Geo. 3, c. 34, it appeared that the partridges and pheasants named in the first and second counts were, on the 9th of February, found in the possession of the defendant, and the defendant was at that time, and before the 1st of February, a qualified person, and such partridges and pheasants had been killed on or before the 1st of February, and had been in his possession at that time.

Per Cur.—1st, the defendant was a qualified person; and 2dly, we are of opinion that the 4th section of the act gives the penalty against any person having in his possession a bird, contrary to the true intent and meaning of that act; and we are of opinion that, if a man should kill a partridge on the 1st of February, and keep it until the 2nd, he would not offend against the true intent and meaning of that act.

III. RELATIVE TO THE CERTIFICATE*.

SCARTH *v.* GARDENER, M. T. 1831. N. P. 5 *C. & P.* 38.

The demand of the certificate need not be made on the land, but should be immediately afterwards, so as to make it one transaction.

IN an action for libel, charging the plaintiff with poaching, and with having been convicted for not producing a certificate, and refusing to give his name, &c.; pleas, justifying the libel.

Tenterden, C. J., held, that although the demand by a gamekeeper, &c., need not be made on the land, yet it must be made immediately after the party has left it, so as to make it one transaction; and that it is not necessary the party demanding should produce his own, and that, if the other refuses, he does so at his peril, if the party demanding it be duly authorized; and that, if the party refuses to give his name, it is unnecessary to go on and ask in what place, if any, he is assessed:—Held, also, that the conviction, reciting it, was sufficient evidence of the information.

See Molton v. *Rogers*, 4 *Esp.* 215.

IV. RELATIVE TO GAMEKEEPERS†.

BUSH *v.* GREEN, T. T. 1839. C. P. 4 *Bing.* 41; S. C. 3 *Scott*, 289.

To make the deputation available, it must be inrolled under the 1 & 2 Will. 4, c. 32, s. 13.

IN an action of trover for a gun, the defendant justified the seizing of it under 1 & 2 Will. 4, c. 32, s. 13; and it appeared that his deputation as gamekeeper had been granted and inrolled with the clerk of the peace prior to the act taking effect, but not under that act.

The Court held, that he was not entitled to the privilege conferred by it, of notice of action, and giving all matters in evidence under the general issue, not being inrolled under 1 & 2 Will. 4.

Ex parte SYLVESTER, H. T. 1829. K. B. 9 *B. & C.* 61.

A steward of a qualified person may, by his conduct, render himself liable to penalties.

THE defendant was convicted, under the 5 Ann. c. 14, s. 4, for keeping and using a gun to kill and destroy game. The facts were, that on the 2nd of September, 1828, the defendant (not being qualified) was seen with a gun in his hand shooting at a partridge; but in his defence it was proved that he was in the presence of Mr. Lee, a qualified person, who stated that the defendant was employed by him as his servant, to accompany him into the field shooting. This person did not shoot, nor use any gun for the purpose. The defendant was convicted. On motion to quash the conviction—

The Court held, that an unqualified servant of a qualified person is not justified in firing off a gun for the destruction of game, though in the presence and by the authority of his master, who is himself not using a gun at the time.

LEDSTER *v.* BARROW, H. T. 1839. Q. B. 1 *P. & D.* 447; S. C. 9 *Ad. & E.* 654.

A gamekeeper, appointed and

IN trespass, it appeared that the defendant was a gamekeeper, and had seized two greyhounds under circumstances of suspicion.

* As to the duty on, see 52 Geo. 3, c. 93.

† Stamp duty, as to, see 55 Geo. 3. c. 184.

His deputation was dated in 1814, and had then been registered, but had not been renewed since the passing of the 1 & 2 Will. 4, c. 32. No notice of action having been given as required by sect. 47, his Lordship nonsuited the plaintiff.

registered, before 1 & 2 Will. 4, c. 32, is not entitled to notice of action under 47th section.

The Court held, that *Bush* v. *Green*, (ante, p. 120), in which it had been decided by the Court of Common Pleas, that the notice was not required where the deputation was granted and registered previously to the 1 & 2 Will. 4, c. 32, was a correct decision, and made the rule absolute.

RUSHWORTH *v.* CRAVEN, T. T. 1825. Ex. 1 *M. & Y.* 417.

IN debt for penalties—

The Court held, that to render a deputation a defence, the party must go into evidence of colourable title to the manor; and that, serious claim of title existing on the part of those under whom he claims to act, mere production of a deed executed by parties as trustees, not inrolled, though in a registered county, asserting the right, was not a sufficient foundation in fact to let in evidence of reputation to go to a jury.

If a deputation be the defence, evidence of title must be shewn.

V. RELATIVE TO THE REMEDIES CONNECTED WITH.

(*a*) BY ACTION.

RUSHWORTH *v.* CRAVEN, T. T. 1825. Ex. 1 *M. & Y.* 417.

IN debt for penalties, the defendant not having called for a particular of the offences—

The Court held, that the plaintiff might rely on an offence committed, although not known to plaintiff, within six months before the action brought; and that the Judge improperly directed the jury to say, if that was the offence in respect of which the action was brought.

If no particulars, any offence may be proved.

WISDOM *v.* HODSON, M. T. 1833. Ex. 3 *Tyrw.* 811.

PLEAS in trespass, justifying the seizing the plaintiff as being an unlicensed person, and having in his possession game recently killed, and refusal after demand made to deliver up the game.

The Court held the pleas bad, for not shewing where the demand was made or on what land; and also, that such seizing was gently done for the purpose of taking the game, and with an unnecessary or greater violence than required by the plaintiff's resistance.

A general plea, that the defendant seized the plaintiff, being possessed of game, and not qualified, is not sufficient*.

* Where one defendant, in an action for trespassing in pursuit of game, justified under the authority of the other, who being owner of the lands, had demised them, with an alleged reservation of the game; and it appeared that the former had been summoned before a magistrate for the trespass, and on the defendant being called the case was dismissed:—Held, that the second defendant having never actually entered the proceedings before the magistrate under 1 & 2 Will. 4, c. 32, s. 46, was a bar to the action against both. (*Robinson* v. *Vaughan*, 1838, N. P., 8 C. & P. 252).

(*b*) Informations*.

Middleton *v.* Gale, E. T. 1838. Q. B. 3 *N. & P.* 372; S. C. 8 *Ad. & E.* 155.

Under the 1 & 2 Will. 4, the information for trespassing in pursuit of game may be laid by a party having no interest in the land.

In an action on the case, upon a conviction for killing game contrary to the statute, upon the complaint of one Sparks. It was proved on behalf of the plaintiff, at the trial, that Sparks had no interest in the lands in question; and it was contended, that, under the 1 & 2 Will. 4, c. 32, s. 30, the justices had no jurisdiction to hear the complaint of any other person than the owner or occupier of the land, or some person having the right to the game, and that it should appear upon the conviction that the complaint was made by such a person.

The Court held, that the Game Act, 1 & 2 Will. 4, c. 32, authorizes any person to make a complaint under sect. 30, and does not confine that power to the owner or occupier of the land.

Davies *v.* Bint, M. T. 1824. K. B. 5 *D. & R.* 353; S. C. 3 *B. & C.* 586; S. C. 1 *C. & P.* 439.

The 48 Geo. 3, c. 58, relates to offences only over which the Court of K. B. has exclusive jurisdiction by indictment or information.

On an information under the 48 Geo. 3, c. 58, for penalties for offences against the game laws—

Per Cur.—We are of opinion, that the stat. 48 Geo. 3, c. 58, does not apply to an information brought for penalties on the game laws. It enacts, "that when any person shall be charged with an offence for which he may be prosecuted by indictment or information in his Majesty's Court of King's Bench:" it, therefore, contemplates offences over which this Court has exclusive jurisdiction by indictment or information. Now, penalties under the game laws may be recovered by information, not only in this Court, but in the other Courts in Westminster Hall. We think the statute applies only to such offences as the Court of King's Bench may exclusively entertain when prosecuted by indictment or information at the suit of the King.

(*c*) Convictions.

Griffiths *v.* Harries, H. T. 1837. Ex. 2 *M. & W.* 335.

Since the 5 & 6 Will. 4, a conviction under 1 & 2 Will. 4, as to the penalties, is bad.

By the 1 & 2 Will. 4, c. 32 (the Game Act), all penalties were to be paid to the overseers of the poor of the parish in aid of the county-rate; but, by the 5 & 6 Will. 4, c. 20, s. 21, it is directed, that the penalties shall be paid one moiety to the informer, and the other to the overseer of the parish, to be by him applied in the manner therein directed.

The Court held, that a conviction under the first act, directing the whole penalty to be paid to the overseer to be by him applied according to law, was bad; and that the justices who signed it were liable to an action for false imprisonment.

* Before whom to be laid and determined, see *Jones* v. *Gurden*, 2 G. & D. 133.

REX *v.* LONG, M. T. 1827. K. B. 1 *M. & Ry.* 139.

ON motion, a certiorari to remove a conviction under 52 Geo. 3, c. 93, for using a dog and gun without a certificate, on the ground that jurisdiction does not appear on the face of the conviction.

Per Cur.—The statute directs, that no "conviction of such commissioners or justices shall be removable by any process whatever into any other Court." The object of the legislature was to avoid those questions which might be raised in this Court upon a certiorari. Now, if the conviction were removed by certiorari into this Court, it would be competent to the party convicted to take the objection which has now been urged. In other cases, where the want of jurisdiction is shewn by affidavit, the rule as to the certiorari being taken away does not apply.

Before 1 & 2 Will. 4, to obtain a certiorari to remove a conviction for using a dog and gun, there must have been an affidavit shewing the want of jurisdiction*.

VI. RELATIVE TO DEER STEALING, AND LARCENIES CONNECTED WITH GAME†.

VII. RELATIVE TO POACHING‡.

* A conviction upon 1 & 2 Will. 4, c. 32, s. 3 (Game Act), held to be still irremovable by certiorari, the 5 & 6 Will. 4, c. 20, s. 21, only changing the application of the penalties. (*Rex* v. *Hester*, H. T. 1836, B. C., 4 D. P. C. 589).

† By 7 & 8 Geo. 4, c. 29—Sect. 26. What acts as to deer in forests, chases, purlieus, or inclosed grounds to be deemed felony. What acts as to deer in uninclosed grounds of forests, chases, or purlieus punishable summarily. Second offence as to deer (after a first offence punishable summarily) to be also deemed a felony.

Sect. 27. Suspected persons found in possession of venison, &c., and not satisfactorily accounting for it: in case they cannot be convicted, how justices of the peace may proceed.

Sect. 28. Setting engines for taking deer, or pulling down park fences.

Sect. 29. Deer-keepers, &c., may seize the guns, &c., of offenders who, on demand, do not deliver up the same. Resistance to keepers, &c., in the execution of their duty.

Sect. 30. Killing, &c., hares or conies in a warren in the night time. The like in the day time.

Sect. 31. Stealing dogs, or stealing beasts or birds ordinarily kept in confinement, and not the subjects of larceny.

Sect. 32. Persons found in possession of stolen dogs, &c., liable to penalties.

Sect. 33. Killing pigeons.

On an indictment under the stat. 7 & 8 Geo. 4, c. 29, s. 26, for killing a deer, after a previous summary conviction, a conviction by two justices of the previous offence was put in:—Held, that such a conviction was good. This conviction, in stating the offence, did not state the place at which it was committed; but the justices, in awarding the distribution of the penalty, awarded it to the overseers of D., in the said county, "where the said offence was committed:"—Held sufficient. (*Rex* v. *Weale*, 1831, N. P., 5 C. & P. 135. See 7 & 8 Geo. 4).

† By 9 Geo. 4, c. 69,—Sect. 1 repeals 57 Geo. 3, c. 90; and by same section, persons taking or destroying game by night to be committed, for the first offence, for three months, and kept to hard labour, and to find securities; second offence, six months, and kept to hard labour, and to find sureties; third offence, to be liable to transportation.

Sect. 2. Owners or occupiers of land, lords of manors, or their servants, may

(*a*) What are or are not considered as game*.

(*b*) Of the offence†.

(*c*) Of the weapon‡.

(*d*) Where jointly or severally guilty§.

apprehend offenders. Offenders assaulting or offering violence deemed guilty of misdemeanor, and liable to be transported for seven years, or imprisoned for two years.

Sect. 3. By whom warrants for apprehension of offenders may be issued.

Sect. 4. Limitation of time for proceedings under this act.

Sect. 5. Form of conviction.

Sect. 6. Appeal.

Sect. 7. No certiorari, &c.

Sect. 8. Convictions to be returned to the quarter sessions and registered, and may be given in evidence.

Sect. 9. Persons to the number of three, being armed, entering any land for the purpose of taking or destroying game, to be deemed guilty of a misdemeanor.

Sect. 10. Jurisdiction of sheriffs in Scotland, and proving of convictions there.

Sect. 11. Where third, or transportable offences under this act, are to be tried in Scotland.

Sect. 12. What time shall be considered night.

Sect. 13. What shall be deemed game.

* Destroying rabbits kept in a rick-yard:—Held, not to be a ground lawfully used for the breeding or keeping of conies, within 7 & 8 Geo. 4, c. 29, s. 30. (*Rex* v. *Garratt*, 1834, N. P., 6 C. & P. 369).

† Where the indictment, upon 9 Geo. 4, c. 69, s. 9, charged the prisoner with entering and being by night armed, with the intent &c.:—Held, that the statute creating two offences, the indictment was sufficient, and that one act only need be proved. (*Rex* v. *Kendrick*, 1835, N. P., 7 C. & P. 184).

To justify the apprehension of a person under the 31st section of the Game Act, (1 & 2 Will. 4, c. 32), he must have been required to quit the land and to tell his name; and the "wilfully continuing or returning upon the land," to justify an apprehension, must be upon the same land, and for the purpose of pursuing game there. (*Rex* v. *Long*, 1836, N. P., 7 C. & P. 314).

‡ Where the only weapon found on the prisoner was a common walking-stick:—Held, that if there were circumstances shewing an intention to use it for purposes of offence, it might be an offensive weapon within the statute; aliter, if the jury find that it was in his possession in the ordinary way, and, upon unexpected attack or collision only, he used it offensively. (*Rex* v. *Fry*, 1837, N. P., 2 M. & Rob. 42).

Where a prisoner, being lame, was found out at night for the purpose of taking game, with the same stick as he usually walked with:—Held, that it was for the jury to say if he had taken out the stick for the purpose of using it as an offensive weapon, or only for its ordinary use. (*Rex* v. *Palmer*, 1831, N. P., 2 M. & M. 70).

§ Where one of several went by himself to poach in a distinct field:—Held, not an entry by the others into that field, to support the indictment; nor where they remained out in the road, and sent in their dogs into an adjoining field, to drive the game into nets set by them. (*Rex* v. *Neckless*, 1839, N. P., 8 C. & P. 757). But where several were out together for the common purpose of poaching:—Held, that one might be convicted, although never bodily within the wood where the others had entered. (*Rex* v. *Passey*, 1836, N. P., 7 C. & P. 282; S. P. *Rex* v. *Lockett*, 1836, N. P., Id. 300).

The 57 Geo. 3, c. 90, (repealed by 9 Geo. 4, c. 69), giving gamekeepers and others power to apprehend poachers, gave them the same protection as afforded to constables in the execution of their duty; where, therefore, several persons, being clearly engaged in the same unlawful purpose of killing game, acted together in resisting the apprehension, by all pointing their guns, &c.:—Held, that they were all guilty, although only one fired the gun: it might have been different if any had separated themselves, shewing distinctly that they would take no share in that part of the transaction. (*Rex* v. *Edmunds*, 1828, N. P., 3 C. & P. 390).

(*e*) Whether murder or manslaughter*.

(*f*) Remedies connected with.

1. *Of the Indictment.*

Davies *v.* Rex, M. T. 1829. K. B. 10 *B. & C.* 89.

An indictment for poaching must allege that the defendants entered armed &c., with intent &c., by night†.

An indictment alleged that the defendants, to the number of three and more together, "did by night unlawfully enter &c. divers closes" &c., situate &c. and in the occupation of &c., and were then and there in the said closes &c., armed with guns &c., for the purpose of then and there taking and destroying game, against the form &c.

The Court held, that the two members of the sentence were distinct; and that the first, stating the entry by night, did not allege that the defendants were armed, or the intent with which they entered; and the second stated them to be armed, and that they were in the closes for the purpose of destroying game, but not that they were there by night. Neither branch, therefore, containing all the requisites of the statute to constitute the offence, the indictment was insufficient.

* A servant of Mr. C. attempted to apprehend A., who was out at night poaching in a wood, and he was killed by A. Mr. C. was neither the owner nor the occupier of the wood, nor the lord of the manor, he having only the permission of the owner to preserve game there:—Held, that this was manslaughter only in A. (*Rex* v. *Addis*, 1834, N. P., 6 C. & P. 388). So, the interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. (*Rex* v. *Warner*, 1833, 1 Moo. C. C. 380). The servant of the owner of a wood attempted to apprehend a poacher, whom he found there at eight o'clock in the morning of the 17th of December, and the poacher shot at him:—Held, that this was not a capital offence within the stat. 9 Geo. 4, c. 31, ss. 11 and 12, as there was no proof that the poacher was in pursuit of game one hour before sunrise. (*Rex* v. *Tomlinson*, 1835, N. P., 7 C. & P. 183). It is not necessary to shew that the parties were in the place charged with the intent to kill game there. (*Rex* v. *Gainer*, 1835, N. P., 7 C. & P. 231). So, where one, after a keeper had been left senseless, returned and robbed him:—Held, that he alone could be convicted of the robbery, the intention of stealing being confined to him. But where, after two had surrendered, they called to a third, who came up and killed a keeper:—Held to be murder in all, although no blow was struck by him, and the keepers had not declared why or in what character they apprehended them. (*Rex* v. *Whithorne*, 1828, N. P., 3 C. & P. 394).

† An indictment under 9 Geo. 4, c. 69, s. 9, held sufficient, although not charging whether the land entered on was inclosed or not:—Held, also, that where some of the party were in the lands stated, and others in the adjoining land co-operating in the same purpose, all were guilty of the offence. (*Rex* v. *Andrews*, 2 M. & Rob. 37). An indictment for assaulting a game-keeper with a weapon, (under the stat. 9 Geo. 4, c. 69, s. 2), stated, that the defendants were in certain land of J. R., Earl of B., by night, armed with guns, for the purpose of destroying game; and that they were "then and there in the said land by night as aforesaid by one W. R., the servant of the said J. R., Earl of B., then and there having lawful authority to seize and apprehend the said (defendants), found;" and that the defendants with guns, &c. assaulted and offered violence to W. R.:—Held, that the indictment was bad; as it did not sufficiently shew that the defendants, when found by W. R., were committing any offence against the stat. of 9 Geo. 4, c. 69. (*Reg.* v. *Curnock*, 1841, N. P., 9 C. & P. 730).

2. *Of the Evidence**.

3. *Of the Conviction*†.

Gaming‡.

See, also, tit. *Wager*.

I. RELATIVE TO WHAT GAMES ARE OR ARE NOT LEGAL, AND OF THE CONSTRUCTION OF THE STATUTE OF ANNE, p. 127.

II. RELATIVE TO CONTRACTS RELATING TO, p. 127.

III. RELATIVE TO GAMING HOUSES, p. 128.

IV. RELATIVE TO PENALTIES, p. 129.

V. RELATIVE TO REMEDIES CONNECTED WITH.

(*a*) ACTION, p. 129.

1. *Declaration*, p. 129.

2. *Pleas*, p. 130.

(*b*) INDICTMENT, p. 130.

* Where, on an indictment for poaching, the only evidence was of a coat belonging to a gamekeeper being found in the prisoner's house, (and for stealing which there was a separate indictment), the Judge refused to receive evidence of such finding, unless the prosecutor would consent to an acquittal on the latter indictment. (*Rex* v. *Westwood*, 1831, N. P., 4 C. & P. 547). To support an indictment for night poaching by three or more, being armed, &c., it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, and that the rest of the party were in another wood which was separated from the place mentioned by a turnpike-road. (*Rex* v. *Dowsell*, 1834, N. P., 6 C. & P. 398). An indictment for night poaching, which charges, that A. and B., together with another person, entered certain land, "the said A. and B. then and there being armed," is not supported by proof that the third person was armed, and that A. and B. were not so. (*Rex* v. *Davis*, 1839, N. P., 8 C. & P. 759). On an indictment under 57 Geo. 3, c. 90, a man might be convicted of having entered a wood, and of being found armed there, though he is not seen in such wood; it is sufficient, if there be evidence to shew he had been there armed. (*Rex* v. *Worker*, 1827, 1 Moo. C. C. 165). In an indictment on 57 Geo. 3, c. 90, for having entered a given close with intent there to kill game, and being there found armed, it was necessary to prove an entry into the close specified. But quære, whether it is necessary he should have such an intent in the place in which he is found armed, unless so stated in the indictment. (*Rex* v. *Barham*, 1826, N. P., 1 Moo. C. C. 151).

† In a conviction for a trespass in the daytime, under the 1 & 2 Will. 4, c. 32, s. 30, (the Game Act), the words "enter and be" constitute only one offence. In a conviction under the same section, the place of committing the trespass may be described as "certain land," without giving it a name or setting it out with abuttals. (*Rex* v. *Mellor*, T. T. 1833, B. C., 2 D. P. C. 173).

‡ By 16 Car. 2, c. 7, "All persons who, by fraud, theft, covenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, tables, tennis, bowles, skittles, shovel board, or in or by cock-fighting, horse-races, dog-matches, foot-races, or other pastimes, game or games

I. RELATIVE TO WHAT GAMES ARE OR ARE NOT LEGAL, AND OF THE CONSTRUCTION OF THE STATUTE OF ANNE.

HODSON *v.* TERRILL, T. T. 1833. Ex. 1 *C. & M.* 797; S. C. 3 *Tyrw.* 929.

A cricket match above 10*l.* is illegal within the statute of Anne*.

ASSUMPSIT for money had and received, against a stakeholder, to recover a deposit of 20*l.* upon a cricket match. It appeared that the Birmingham Union Club and the Warwick Club having agreed to play a match at cricket for twenty sovereigns aside, the parties met on the 8th of October, and each deposited 20*l.* in the hands of the defendants. The game was played to the end of the first day; but on the second day, in consequence of an objection that one of the Warwick players belonged to another club, the Birmingham club refused to play out the match, and the plaintiff, who had made the deposit as their agent, gave the defendant notice not to pay it over, but to repay it to him. The defendant, however, paid it over to the Warwick club under an indemnity. *Denman*, C. J., directed a nonsuit. On motion to set the nonsuit aside—

The Court made the rule absolute, being of opinion that a cricket match, although it occupy more than one day in playing, is illegal within 9 Anne, c. 14, s. 2; and assumpsit for money had and received lies against the stakeholder who has paid over the deposit thereon after notice not to pay it over.

See 1 *D. P. C., N. S.*, 783; 4 *Scott, N. R.* 378; 10 *M. & W.* 85.

II. RELATIVE TO CONTRACTS RELATING TO†.

PATERSON *v.* POWELL, M. T. 1832. C. P. 9 *Bing.* 320; 2 *M. & Scott*, 399.

A contract to pay 100*l.* in

DECLARATION on a contract in consideration of forty guineas for 100*l.*, and so, according to that rate, for every greater or less sum,

whatsoever, or in or by bearing a share or party in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as play, act, ride, or run, win, obtain, or acquire to themselves, or to others, any money or other valuable thing, are to forfeit treble the value of the money or thing so won, gained, obtained, or acquired, one moiety to the King, and one moiety to the party grieved, to be sued for within six calendar months; and in default of suit within that time, the whole to any informer who shall sue within one year after it is expired." By 9 Anne, c. 14, s. 5, any person winning by fraud above 10*l.* at one sitting, and convicted thereof on indictment, is to forfeit five times the value, be deemed infamous, and suffer as in case of wilful perjury.

The 19 Geo. 2, c. 34, s. 8, extended this to 10*l.* at one time, or to 20*l.* in twenty-four hours.

The 13 Geo. 2, c. 19, s. 2, prohibits horse-races for sums under 50*l.* (See 3 & 4 Vict. c. 5; and *Evans* v. *Pratt*, 4 Scott, N. R. 378; 10 M. & W. 85).

* The true construction of 9 Anne, c. 14, s. 3, in reference to the 18 Geo. 2, c. 34, is, that persons who have lost their money at play are the only persons entitled under it to file a bill for a discovery, and not a mere common informer, in aid of a qui tam action. (*Orme* v. *Crockford*, E. T. 1824, Ex., 13 Price, 376; 1 M'Clel. 185; *Cowen* v. *Phillip*, 3 Anstr. 843).

† See ante, *Bills and Notes*, Vol. 2, p. 259. By the 5 & 6 Will. 4, c. 41, so much of the 16 Car. 2, c. 7, as enacts that any note or bill shall be void by reason of gaming, is repealed; and it is enacted instead, that such securities shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration only.

consideration of a smaller sum, if shares in a certain company were done at or above a named price, is illegal.

several persons, each for themselves, severally engaged to pay the several sums set opposite their names in case Brazilian mining shares should, on or before a certain day, be done at or above a certain sum—

The Court held, 1st, that such a contract was a policy of insurance, and void under 14 Geo. 3, c. 48; and the rule of law being, that, if money be paid on an illegal contract to receive a larger sum upon a certain event, the contract is executed when the event takes place, and the premium paid cannot be reclaimed; and, 2ndly, that such contract was executed on the event taking place; and, consequently, that the plaintiff had no claim to a return of the premium paid.

M'Kinnell *v.* Robinson, E. T. 1838. Ex. 3 *M. & W.* 434.

So, money lent to play at an illegal game (hazard) cannot be recovered.

In assumpsit for 30*l.* money lent; plea, that the sum of money was borrowed by the defendant, as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant, in a certain common gambling room, in and parcel of a certain messuage and premises, for the purpose of the defendant's illegally playing and gaming therewith, at and in the said gambling room, at a certain illegal game, to wit, the game of hazard, contrary to the statute in such case made and provided. On demurrer—

The Court said, notwithstanding prior authorities, we think the money lent cannot be recovered; for it is lent for the *express purpose* of a violation of the law, and enabling the borrower to do a prohibited act; and the principle is now distinctly laid down, and may be considered as finally settled, that money so lent cannot be recovered.

III. RELATIVE TO GAMING HOUSES.

Rex *v.* Wood, E. T. 1832. K. B. 3 *B. & Ad.* 657.

A second party may proceed where an indictment for keeping a gaming-house is removed by certiorari, although the original prosecutor requires him to forbear.

On a rule to shew cause why all proceedings in this prosecution should not be stayed, with costs of the present application to be paid by Pearce, and also to shew by what authority he acted as the prosecutor's attorney. It appeared that Pearce, the party above referred to as the prosecutor, at the September Sessions for Middlesex, 1830, preferred an indictment against Wood for a nuisance, in keeping a common gaming-house, and the bill was found. It was alleged, that the prosecutor stepped in consequence of a compromise; but in the affidavit on which this rule was obtained, Pearce stated, that, when the indictment was removed, the nuisance had ceased,

By 9 Anne, c. 14, s. 2, any person who shall at any time or sitting, by playing at cards, dice, tables, or other game whatsoever, or by betting, lose to any one or more persons so playing or betting, in the whole the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof, may, within three months, recover the money or goods so lost and paid, or delivered, or any part thereof, from the winner, with costs, by action of debt founded on the act.

The judgments made void by the 16 Car. 2, c. 7, and 9 Anne, c. 14, are judgments given by the loser to the winner, or to some one for his benefit, as a security for money lost, and do not include judgments obtained by a bonâ fide indorsee of a negotiable instrument given originally for a gambling debt. (*Lane* v. *Chapman*, E. T. 1840, Q. B., 3 P. & D. 668; S. C. 11 Ad. & E. 966).

and that it had not since been renewed. After the communication from Pearce, instructions were given to John Silk, an attorney, by Hague, for carrying on the prosecution. A venire facias was sued out by Silk for the purpose of bringing the case to trial.

Per Cur.—We cannot interfere. In the *King* v. *Oldfield*, in 1823, where a prosecution for this offence had been discontinued, the Court directed the Attorney-General to proceed, and the proceedings were carried on to sentence.—Rule discharged.

IV. RELATIVE TO THE PENALTIES.

Willans *v.* Taylor, T. T. 1827. K. B. 7 *B. & C.* 111.

The moiety of the penalty which goes to the poor is clear of costs*.

In debt upon the stat. 9 Anne, c. 14, s. 2, for treble the value lost at play. The statute gives the penalty with costs of suit, and directs half the penalty to the use of the person that will sue for the same, and the other to the use of the poor of the parish where the offence shall be committed. In this case there was a verdict for the plaintiff for 450*l.*, upon which judgment was obtained, and the costs were taxed. The defendant then brought a writ of error in Parliament, where the judgment was affirmed; but the costs of the writ of error were refused.

Lord *Tenterden*, C. J.—There is no authority whatever on the point; and, in the absence of authority, we are of opinion that the poor are entitled to their moiety without costs being deducted.

V. RELATIVE TO REMEDIES CONNECTED WITH.

(*a*) By action.

1. *Declaration.*

Taylor *v.* Willans, E. T. 1826. C. P. 3 *Bing.* 449.

Declaration, alleging that plaintiff *lost to*, without alleging that he lost by playing *with*, defendant, sufficient.

In debt on the statute of Anne, the declaration alleged, "that one William Willans, at the parish of St. James, in the county of Middlesex, did at one and the same sitting, by playing at a certain game called rouge et noir, lose to the defendant a large sum of money, to wit 50*l.*, and did then and there pay the same to the said defendant:—Held sufficient in error, without alleging the money to have been lost by playing *with* him.

* In an action for penalties upon 9 Anne, c. 14, s. 2:—Held, on error, that "St. James's," in the county of Middlesex, being the proper name of the parish, it was sufficient after verdict, although there are two, viz. in Westminster and Clerkenwell, as the right parish to be entitled to recover its moiety is upon proof that it was the parish in which the offence was committed. (1 Dowl. P. C., N. S., 19; S. C. 1 Bli. N. S. 415).

EVANS *v.* FRYER, T. T. 1839. Q. B. 2 *P. & D.* 541.

In an action for gaming, the declaration may be amended.

IN an action of assumpsit on a wager that a railroad would be completed by a certain day for the general conveyance of passengers, and the wager proved was simply that it would be completed, and the Judge permitted an amendment by striking out those words—

The Court held it properly done, as imposing an increased burthen on the plaintiff, and not being an amendment in any material particular.

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2. Pleas.

TEMPLE *v.* KEILY, M. T. 1840. C. P. 9 *D. P. C.* 62; S. C. 2 *Scott, N. S.* 167.

Pleas of gaming, founded on different parts of the statute of Anne, will be allowed.

To debt for gaming; pleas, alleging consideration of a debt to be money lent for the purposes of gaming, and money lost at play. It was submitted that the pleas were not in apparent violation of the Rule of Court, H. T. 2 Will. 4, s. 1, and that they set up distinct and substantive matters of defence. On a rule that these pleas be pleaded conditionally—

Per Cur.—It appears to us, that the two defences are manifestly different; and if they are manifestly different, the condition which is inserted in this order ought not to be imposed. One of the pleas alleges the loan of money for the purpose of its being employed in gaming, and the other alleges the debt to have been contracted in respect of money lost at play. These pleas are founded upon different parts of the same statute.

BOULTON *v.* COGHLAN, T. T. 1834. C. P. 1 *Bing. N. S.* 640; S. C. 1 *Scott*, 588.

If one security for gaming be given in lieu of another, both should be pleaded.

IN an action on a note by an indorsee; plea, that the defendant, on 23rd July, lost a sum at gaming to one A., and that afterwards, to wit, on 12th December, the day of the date of the note, it was agreed that the payment should be secured by the note of the defendant, and which was the same note mentioned in the declaration, and was void; it appearing in evidence, that the note made in December was given in substitution of one made in July to the then holder, and by whom the substituted note was afterwards indorsed to the plaintiff—

The Court held, that the evidence did not support the plea, but that the defendant should have pleaded the substituted as well as the original agreement.

(b) INDICTMENT*.

REX *v.* TAYLOR, M. T. 1824, K. B. 3 *B. & C.* 69; S. C. 5 *D. & R.* 422.

A plea of former acquittal

PLEA to an indictment for keeping a gaming house on &c., and in the second year of the reign &c., that on &c., in the fourth year

* An indictment for this offence must conclude contra pacem. (*Rex* v. *Taylor*, 3 B. & C. 502; S. C. 5 D. & R. 422).

&c., defendant was arraigned for keeping a gaming-house on the &c., in the 57th year of the late King, &c., and on divers other days &c., between that day and the taking of that inquisition, averring the identity of the offence and acquittal of the defendant:—Held, on demurrer, first, that as it appeared, manifestly, that the offences charged in the two indictments could not be the same, the defendant could not, by averment, shew that they were, as he would thereby contradict the record; and, secondly, that the first indictment comprised only offences committed in the reign of the late King.

must clearly relate to the offence for which the party is alleged to be a second time indicted.

Gaol. See tit. *Prisons.*

Gaoler. See tit. *Prisons.*

Gardens. See 7 & 8 *Geo.* 4, *c.* 29.

Gas Rate.

PAYNTER *v.* LIVERPOOL GAS COMPANY, E. T. 1836. K. B. 3 *Ad. & E.* 433.

BY the 72nd section of an act of 4 Geo. 4, creating the Liverpool Gas Company, it was enacted, "that in case any party who shall contract with the company, or agree to take, use, or enjoy the benefit of the gas, shall refuse or neglect, after the space of ten days after demand, &c., to pay the rent or rents, sum or sums of money then due, and owing to the said company for gas supplied by them to any person, the rent, or rents, &c. shall and may be recovered by the company, &c. by warrant, under the hand and seal of any justice of the peace, &c.; and it shall be lawful for the company, &c., with such warrant, to levy the sum or sums so due, &c. by distress and sale of the goods and chattels of the party so neglecting or refusing to pay the same," &c.

A warrant for non-payment of a gas rate without a previous summons is illegal.

The Court held, that under this clause a justice was not empowered to issue such warrant without a previous summons, and that the warrant of the justice was a judicial and not a mere ministerial act.

See T. R. 275.

Gazette.* See tit. *Bankrupt.*

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* The Gazette is evidence of acts done by or to the King in his real character, and is proof of articles of war purporting to be printed by the King's printer.

General Issue. See tit. *Plea*; and particular Titles according to subject-matter.

Gift*.

HAYSLIP *v.* GYMER, E. T. 1834. K. B. 3 *N. & M.* 479; S. C. 1 *Ad. & E.* 162.

A statement made by a party as to a gift is evidence.

THE plaintiff had received, in the lifetime of the owner, certain notes as an alleged gift; and after the death of the party, the defendant having inquired as to what property of the deceased the plaintiff was possessed, she voluntarily produced the notes, stating at the time how she had received them, and the defendant had refused to deliver them back.

The Court held, that her account, as part of the res gestæ was admissible to go to the jury, as to the way she became possessed, which, with other circumstances, might induce the jury to believe it correct or not.

Glass.

ATTORNEY-GENERAL *v.* BELL, T. T. 1828. Ex. 2 *Y. & J.* 431.

Under 6 Geo. 4, c. 117, s. 2, the lading out of glass can only take place at the termination of each particular journey or making.

THE 6 Geo. 4, c. 117, after reciting the stats. 17 Geo. 3, c. 39, s. 31, and 51 Geo. 3, c. 69, s. 34, enacts, "that from and after the 5th day of July, one thousand eight hundred and twenty-five, the same or so much of the said last-mentioned acts respectively, as are above recited, shall be and are hereby repealed." Sect. 13 enacts, "that it shall not be lawful for any maker or makers of flint glass to unstop or take down any stopper from his, her, or their pot or pots, containing any materials or metal, or other preparation for the making of flint glass, (the same not being a pot cracking or breaking, whilst the same is filled with such materials, metal, or preparation, as aforesaid), without giving six hours' notice, in such manner in other respects as by the act required; and all such pots, as aforesaid, which shall be charged with any such materials or metal, or other preparations as aforesaid, for any par-

(*Rex* v. *Holt*, M. T. 1793, K. B., 5 T. R. 436). And it has been held, that a proclamation for the discovery of offenders may be proved by the Gazette, in order to shew that such outrage had been committed. (*Rex* v. *Sullen*, H. T. 1816, K. B., 4 M. & S. 546). But the Gazette cannot be received to prove facts between individuals, as the appointment of an officer in the army, (*Kirwan* v. *Cockburn*, E. T. 1704, K. B., 5 Esp. 233), or dissolution of partnership, unless supported by other evidence. (*Godfrey* v. *Turnbull*, T. T. 1795, K. B., 1 Esp. 371).

* A gift by a father to his son under age, made absolutely, and accepted, cannot be reclaimed without the consent of the son. (*Smith* v. *Smith*, 7 C. & P. 401).

ticular journey or making of flint glass, upon such notice to unstop the same, or take down the stopper thereof, as aforesaid, being given, shall be opened all together, and at one and the same time, upon the attendance of the officer or supervisor of excise (if he can be present) for that purpose, and in the presence of such officer or supervisor; and if, upon opening such pots as aforesaid, any pot or pots shall be found to contain materials or metal, or other preparation for the making of flint glass then unfit for the making or working of the same out into glass wares, the whole of the pots charged with such materials or metal, or other preparations of such particular journey or making, shall be stopped up again, and a fresh and like notice for unstopping the same, or taking down the stoppers thereof shall be given, as aforesaid; any thing in this or in any other act or acts of Parliament to the contrary thereof notwithstanding; and if any maker or makers of flint glass shall commit any offence against any of the regulations aforesaid, he, she, and they, respectively, shall forfeit the sum of one hundred pounds."

The Court held, that the lading out can only take place at the termination of a journey or making; and that, if laded out during a journey, the manufacturer is entitled to no deduction, but is liable to the full duty, unless he shew that when the journey is finished the materials so laded out remained in specie, or were put into another pot, as an overtaker, so that the duty would be paid.

ATTORNEY-GENERAL *v.* BELL, M. T. 1830. K. B. 1 *C. & J.* 237.

Where there has been allowance for glass not new, the party will not be deprived of such allowance because the glass is afterwards mixed with other materials.

UPON a new trial in the preceding case, a special verdict stated, that the defendant, Bell, is a maker of flint-glass; that, on the 5th of August, 1825, several pots were laded at his glass-house; among others, one, No. 6; that they were opened on the Monday following, being the 8th; that they were then gauged by the officer, and No. 6 was gauged at 1453 lbs., and the contents charged with duty; that the contents of this pot, No. 6, were worked out except 76 lbs., which had become unfit for use; that the journey ended on Friday, the 12th; that, before that time, a notice was given to lade out No. 6 on Tuesday the 9th; it was so laded out and put into water on the 9th, and thereupon the duty on the 76 lbs. was deducted by the officer from the prior charge. The special verdict further stated, that afterwards the 76 lbs. in question, so laded out by the manufacturer, were mixed with other materials and put into the same pot, which was again stopped, again duly opened, gauged, and charged with duty, in the course of the same journey.

The Court held, that he was entitled to a deduction from the duties payable upon the gauge of the entire journey, in respect of the materials so laded out, having paid the duty in respect of those materials on the gauge of the overtaker.

Goods. *Acceptance of—Action for not**.

* In assumpsit for not accepting tallow, the special counts stating the contract to have been made directly with the plaintiff, the evidence being the bought note, in which the plaintiff was described as broker and as selling for his principal:—Held, that he could not recover. (*Rayner* v. *Linthane*, M. T. 1825, N. P., 2 C. & P. 124).

Goods Bargained and Sold.

ATKINSON *v.* BELL, E. T. 1828. K. B. 8 *B. & C.* 277; S. C. 2 *M. & Ry.* 292.

No action can be sustained as for goods bargained and sold, without shewing a part acceptance or the assent of the defendant as the purchaser.

K., A PATENTEE, received orders for machines from the defendant, and employed the plaintiff to make them, which he did, and delivered them on K.'s premises; they were subsequently altered to a newer plan, and other machines intended by K. also for the defendant were, by K.'s direction, altered to correspond, and the whole, after being packed in boxes for the defendant, remained on the plaintiff's premises, and the defendant was subsequently required to take them, but refused so to do.

The Court held, that although the goods were intended for the defendant, yet until his assent given, or even actual delivery, no property vested in him, and therefore the action for goods bargained and sold was not maintainable against him by the plaintiff:—Held, also, that as the work and labour was bestowed on articles which had never become the property of the defendant, it could not be said to have been done for his benefit, to render him liable.

ELLIOT *v.* PYBUS, E. T. 1834. C. P. 10 *Bing.* 512; S. C. 4 *M. & Scott*, 387.

An action for goods bargained and sold can in general only be sustained where the defendant might maintain trover.

THE defendant agreed with plaintiff for the completion of a machine, and made two payments in advance. During the work he frequently saw the machine, and suggested various alterations. Upon its completion he saw and approved of the article, and requested time for the payment. Finally, however, he refused to accept or to pay. Upon action for goods bargained and sold—

The Court said, that, although a count for goods bargained and sold can only be maintained when the property in the goods has passed from the plaintiff to the defendant, and the latter in a condition to maintain trover; yet where the defendant had, after some dispute, assented to the price charged, and requested to have it sent home before the whole had been paid, which the plaintiff refused to do, it could only be deemed a contest as to the time of payment, and that the property passed from the moment of the defendant's assenting to the price, and the plaintiff therefore entitled to recover.

ALEXANDER *v.* GARDNER, T. T. 1834. C. P. 1 *Bing. N. S.* 671.

A. sold shipped goods to B., who accepted the bill of lading, &c.; during the voyage the goods were lost:—Held, that A. might sue B. for goods bargained and sold.

IN an action for goods bargained and sold, it appeared that the plaintiff, expecting to receive butters, which were to be shipped in October from S. to S., sold them to the defendant by note, specifying the quality, price, time of shipping, and that the price was to be paid by note at two months from the date of the landing. The butters were in fact not shipped until November, but the defendant waived the objection, and accepted the invoice and bill of lading. The butters were afterwards lost by shipwreck, and a small part only arrived in a damaged state.

The Court held, that the plaintiff was entitled to recover in an action for goods bargained and sold, the bills of lading, &c. having been accepted by the defendant before the action brought.

Goods—Contract to Re-deliver.

BAINBRIDGE *v.* FIRMSTON, E. T. 1837. K. B. 1 *P. & D.* 1. S. C. 8 *A. & E.* 743.

IN assumpsit, the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh divers boilers of the plaintiff, the defendant promised to give them up to the plaintiff in the same condition as at the time of such consent; averment, that by such consent the defendant weighed them, and breach for not returning. On a motion to arrest judgment—

The mere delivery of goods to another for a particular purpose, is a sufficient consideration to undertake to return them.

The Court held, that the declaration contained a good consideration for the promise.

Goods Sold and Delivered.

I. RELATIVE TO WHEN THE ACTION FOR GOODS SOLD AND DELIVERED CAN OR CANNOT BE MAINTAINED, p. 135.

II. RELATIVE TO GOODS ON SALE OR RETURN, p. 137.

III. RELATIVE TO CUSTOMS IN TRADE, CONNECTED WITH, p. 137.

IV. RELATIVE TO THE REMEDY.

(*a*) PARTIES TO THE ACTION, p. 138.

(*b*) DECLARATION AND PARTICULARS, p. 138.

(*c*) PLEAS AND REPLICATION, p. 138.

(*d*) INSPECTION OF THE GOODS, p. 139.

(*e*) EVIDENCE, p. 139.

(*f*) WITNESSES, p. 140.

(*g*) DAMAGES, p. 140.

I. RELATIVE TO WHEN THE ACTION FOR GOODS SOLD AND DELIVERED CAN OR CANNOT BE MAINTAINED*.

CHANTER *v.* HOPKINS, M. T. 1838. Ex. 4 *M. & W.* 399.

THE declaration stated, that heretofore, &c., the defendant was indebted to the plaintiff in 15*l.* 15*s.* for the license, consent, and

An action will lie for a ma-

* Where no objection to the articles sold was made until ten months after the delivery, the party cannot avail himself by its turning out to be unfit for the use intended, unless he also shew that deceit has been practised. (*Percival* v. *Blake*, M. T. 1826, N. P., 2 C. & P. 514). In an action by vendee for non-delivery of goods:—Held, that, in an agreement "for the delivery of goods on arrival, to be

chine, and putting it up, although it may not answer a particular purpose, if there was no guarantee that it was fit for such purpose.

permission of the plaintiff before then granted by him to the defendant, at his request, to erect, set up, and use at and upon certain premises of the defendant, a certain patent invention, whereof the plaintiff was then the owner and proprietor, called "Chanter's Smoke Consuming Furnace;" and to use and apply the same for the use and benefit of the defendant, which patent invention of the plaintiff the defendant had then erected and set up, and applied to his own use and benefit under and by virtue of the said license and permission. The defendant sent to the plaintiff the following order:—"Send me your patent hopper and apparatus to fit up my brewing copper with your smoke-consuming furnace." The furnace as ordered was sent and put up in the brewery. The jury found that the smoke-consuming furnace was useless to the defendant for his brewery.

The Court held, notwithstanding, that the plaintiff was entitled to recover the full price, no fraud being imputed to him, inasmuch as the order was for a specific defined article, which was furnished; and that no warranty that it should answer for the required purpose could be imported into the contract.

FERGUSON *v.* CARRINGTON, H. T. 1829. K. B. 9 *B. & C.* 59; S. C. 3 *C. & P.* 548.

But if a party elects to sue for goods sold, he cannot maintain an action till the credit is expired, although he might have treated the sale as a nullity, on the ground of fraud;

THE sale and delivery of the goods were admitted by the defendant, who shewed that they were sold at a certain credit; that the plaintiffs drew upon him certain bills according to the agreed credit, which he accepted; and that the action was brought before either of the bills became due. To get rid of the effect of this evidence, the plaintiffs offered to go into evidence shewing that the purchase by the defendant was fraudulent; that the goods had been obtained under false pretences; and that, shortly after the purchase, he sold the goods at an under-price.

Per Cur.—The case of *Parker* v. *Patrick*, (5 Term Rep. 175), was relied upon by the plaintiffs, as shewing that, under the circumstances which they were about to prove, trover for their goods would lie; but it must not be taken for granted that that case is law. It seems to lay down as a proposition, that where goods are obtained under false pretences, no property passes to the buyer; but it is not necessary, in the present case, to dispose of that question, as here the plaintiffs have treated the whole as matter of contract.

See 5 *T. R.* 175.

delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not arrive without default in vendor the agreement is null. (*Allwyn* v. *Pryor*, T. T. 1826, N. P., 1 R. & M. 406). So, where the plaintiff had supplied a party with numbers of a periodical work, and in ignorance of his death continued to send them to the defendant, who succeeded to the concern, and received and used them:—Held, that he was liable for them as for goods sold and delivered. (*Weatherly* v. *Bonham*, H. T. 1832, N. P., 5 C. & P. 228). And where, in an action for the price of a threshing-machine, the defence was, that it did not properly answer the purpose, and was of no value; but the defendant had never returned it, nor given notice to the plaintiff to take it away, and it had been kept for several years:—Held, that he had thereby waived all objection to its goodness, and was liable to pay for it. (*Cash* v. *Giles*, 1828, N. P., 3 C. & P. 407).

BOULTER *v.* ARNOTT, H. T. 1833. Ex. 1 *C. & M.* 333.

THE declaration contained a count for goods sold and delivered, but no count for goods bargained and sold. It appeared that the defendant, having agreed to purchase a quantity of cigars of the plaintiff for ready money, saw them packed in his boxes in the plaintiff's shop, and desired the plaintiff to keep them until he called for them, the plaintiff observing that "he could not afford to give credit for them." *Vaughan*, B., nonsuited the plaintiff. On motion to set the nonsuit aside—

and an action will not lie in this form, where the goods are packed in the buyer's boxes, but allowed to remain in vendor's shop.

Per Cur.—What the plaintiff said at the time of the packing, that he could not afford to give credit, shewed that this was a ready money transaction. The plaintiff, therefore, had a right to detain the goods till they were paid for, and there was consequently no complete delivery.—Rule refused.

II. RELATIVE TO GOODS ON SALE OR RETURN.

BEVERLEY *v.* LINCOLN, H. T. 1838. Q. B. 2 *N. & P.* 283; S. C. 6 *Ad. & E.* 829.

ON a writ of trial, it was proved that the plaintiff, who was a manufacturer of gas-meters, had been directed by a proprietor of the Lincoln Gas Company, which was a corporation, to make a meter for the company, and the committee of the latter subsequently ratified that order, and also gave the plaintiff an order for five more. It appeared that they had been sent under an understanding or agreement, that if they did not answer they were to be taken back free of expense. The company ultimately rejected them, on the ground that they would not answer, but had retained them a considerable and, as the jury found, an unreasonable time. It was objected, that under these circumstances an action of assumpsit was not maintainable.

If goods sent on "sale or return" be kept an unreasonable time, an action for goods sold and delivered will lie*.

The Court held, that where goods are sold under a contract of sale or return, and are kept an unreasonable time, assumpsit for goods sold and delivered is maintainable.

III. RELATIVE TO CUSTOMS IN TRADE CONNECTED WITH†.

* Goods delivered for sale on approval, under a parol order, unless refused within a reasonable time, the party is to be treated as having accepted them, and therefore liable for the price. (*Coleman* v. *Gibson*, H. T. 1832, N. P., 1 M. & Rob. 168—Per *Tenterden*, L. C. J.).

† Semble, that there is not any custom in the cloth trade, by which a tailor, who receives cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shews that he has delivered it to the seller's order in writing. (*Davies* v. *Halton*, T. T. 1831, N. P., 5 C. & P. 69).

IV. RELATIVE TO THE REMEDY.

(*a*) Parties to the action*.

(*b*) Declaration† and particulars‡.

Earl of Falmouth *v.* Penrose, H. T. 1827. K. B. 6 *B. & C.* 385.

Indebitatus assumpsit will lie for goods and chattels.

In this case—

Bayley, J., said, there are authorities to shew that debt will lie for a chattel. If so, we see no reason why debt will not lie also for goods; but then the promise, as well as the consideration, must be proved.

(*c*) Pleas and replications.

Cousins *v.* Paddon, M. T. 1835. Ex. 2 *C., M. & R.* 547; S. C. 4 *D. P. C.* 48; S. C. 5 *Tyrw.* 535.

Under "never indebted," defendant may shew goods not such as agreed for.

To debt for goods sold, and work and labour; plea, never indebted. On the question as to what might be given in evidence under that plea—

Parke, B., said, the old law certainly permitted the defendant to avail himself, on the general issue pleaded to an indebitatus count, of the defence that the work was improperly done, or the goods delivered not such as were contracted for; and we think the late rules have not introduced any alterations in this respect. The defendant is entitled, under the plea of non assumpsit or nunquam indebitatus to an action for the price of goods, to shew either that there was no sale or delivery, or none such as to make him liable on the contract; so, also, in an action for work and labour and materials, to shew that the work done or materials provided were not such as to render him liable to pay for them under the contract; and then he opens his liability to pay on a contract of another description, namely, on a quantum meruit.

Crawshay *v.* Barry, M. T. 1840. Q. B. 1 *M. & G.* 235.

The defendant cannot plead that the goods

Plea, in assumpsit for goods sold and work done, that the goods were sold to the defendant as agent for others, and that the work was in the shipping, &c., such goods to the defendant's principal.

* Where an account for goods furnished is made to another party, it is to be presumed that the credit is given to him, unless the contrary be clearly shewn. (*Storr* v. *Scott*, M. T. 1833, N. P., 6 C. & P. 241).

† In an action on a note, and for goods sold:—Held, that the venue could not be changed but upon a special application, and unless the intended defence be fully disclosed, and the application be made before plea; although, semble, there need not be an affidavit of merits, nor need it be sworn that the defendant means to examine witnesses. (*Parmeter* v. *Otway*, M. T. 1834, B. C., 3 D. P. C. 66).

‡ The plaintiff's particulars were for goods sold on the 6th of January; the evidence given at the trial was of goods sold on the 28th of May. A verdict having been found for the plaintiff, the Court refused to set it aside, all other accounts between the parties having been settled. (*Fleming* v. *Crisp*, H. T. 1837, Ex., 5 D. P. C. 454).

The Court held the plea bad, as not denying that it was at the defendant's request, and on his credit, nor amounting to the general issue.

were sold to him as agent for others;

STEELE *v.* STURRY, M. T. 1834. C. P. 3 *D. P. C.* 133; S. C. 1 *Scott*, 101.

ASSUMPSIT for goods sold and delivered. The defendant asked leave to plead three pleas: the 3rd, as to part, that the goods were warranted with a sample; 4th, as to part, that the goods were warranted of a merchantable quality; and 5th, as to part, that they were warranted to be one ton weight of black lead.

Per Cur,—The 4th, founded on the implied warranty in law, must be disallowed, for it is rendered needless by the third.

and pleas, with sample, will not be allowed with plea of warranty, founded on an implication of law.

SIMON *v.* LLOYD, E. T. 1835. Ex. 3 *D. P. C.* 813.

To an action in assumpsit for goods sold, the defendant pleaded, as to part, that he had accepted a bill (there being no drawer's name) partly for the debt, and partly for the accommodation of the plaintiff, who accepted it in satisfaction of the debt, and that such bill was not due at the time of the action commenced. Replication, that the bill still remained in the plaintiff's hands unnegotiated and unpaid, and without any drawer's name. On general demurrer—

The Court held, that the plea was good, and the replication no answer to it; the acceptance being irrevocable upon the face of the plea.

To an action for goods sold, plea, that the plaintiff accepted a bill in payment, the plaintiff cannot reply the bill remains unpaid.

(*d*) INSPECTION OF THE GOODS.

DELL *v.* TAYLER, H. T. 1825. K. B. 6 *D. & R.* 388.

ON a rule calling on the defendant to produce an engraved copper-plate in his possession, the alleged bad execution of which formed the defence to the action.

Per Cur.—It is always necessary to go into equity to compel the production of the defendant's property for the purposes of a plaintiff's suit. You may apply to the defendant to permit an inspection; and any inference from his refusal may be left to the jury. We cannot interfere.

Inspection of the goods will not be allowed.

(*e*) EVIDENCE.

RUPPELL *v.* ROBERTS, M. T. 1834. K. B. 4 *N. & M.* 31.

IN an action for goods sold and delivered, it appeared that the goods, upon the direction of A., were ordered by B., in whose name only the invoice was made out, and who paid a bill drawn on him by A. for the amount of the freight. In an action brought for the price against them jointly—

The Court held, that it was competent to the plaintiff to shew that they were jointly interested in the purchase.

If goods be ordered by A. at the request of B., and both be sued, a joint interest in the purchase may be shewn.

(*f*) Witnesses.

Larbalestier *v.* Clark, H. T. 1831. K. B. 1 *B. & Ad.* 899.

A party who has sold goods to defendant, and to whom defendant has paid the money, is a competent witness for him in an action by the real owners of the goods.

Action for goods sold by the plaintiffs to the defendant, at the sale of which, according to the plaintiff's evidence, A. was present. Defence, that the goods had been bought by A. of the plaintiffs, and by him sold to the defendant, who had paid him. To prove this defence, A. was tendered as a witness. Lord *Tenterden* thought that A. must have falsely represented himself to the defendant as the owner of the wine, in order to induce that party to pay him; and that, therefore, he was guilty of fraud, and would be answerable to the defendant, not only for the price of the wine, but for the costs incurred in this action, if the plaintiff should recover. He therefore rejected the witness, as having an interest in defeating the action. A verdict was found for the plaintiffs. On motion for a new trial—

Lord *Tenterden*.—The witness was rejected by me on the assumption, that, supposing him to have been paid the price of the wine, there had been fraud on his part. On further consideration, it seems to me that the circumstances proved do not warrant that assumption. That being so, the witness was improperly rejected, and the rule for a new trial must be made absolute. The other Judges concurred.—Rule absolute.

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7. Damages.

Dixon *v.* Deveridge, M. T. 1825. N. P. 2 *C. & P.* 109.

A promise to pay, but no sum named, only entitles the plaintiff to nominal damages.

In an action for goods sold, a witness proved that he had had a conversation with the defendant, in which the defendant stated that the plaintiff had sent him a letter asking for payment, and as he justly owed it he would pay as soon as he could.

Per Abbott, C. J.—As the defendant by this conversation admits something to be due, the plaintiff is entitled to nominal damages.

Farr *v.* Ward, M. T. 1837. Ex. 6 *D. P. C.* 163; S. C. 3 *M. & W.* 25.

If goods are to be paid for by a bill at two months, interest will be given from the time the bill would have become due.

In an action for goods sold, it appeared that the plaintiff had sold cattle to the defendant to the amount of 252*l.*, and that 32*l.* was paid down, and it was agreed that a bill at two months should be given for the residue. The plaintiff never having received the bill, claimed interest on the amount for which the bill was drawn, from the time when it would have become due. *Gurney*, B., directed the jury that he was entitled to recover.

Parke, B.—*Marshall* v. *Poole*, 13 East, 98, is a direct authority in favour of the plaintiff. There the Court held, that where goods are sold and delivered, upon an agreement by the vendee to pay for them by a bill at a certain date, as interest would have run upon such bill if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due.

Grace, Days of. See tit. *Bills and Notes.*

Grammar School. See tits. *Corporation—Ejectment—School.*

Grand Jury. See tit. *Jury.*

Grant*.

See, also, *Particular Titles.*

HEWLINS *v.* SHIPPAM, H. T. 1826. K. B. 5 *B. & C.* 221.

The grant of an easement on land must be by deed.

IN an action for stopping up a drain leading from plaintiff's premises through the defendant's yard, the declaration claiming the right under a license by parol, granted to the plaintiff's landlords, "their heirs and assigns," to make the drain across the defendant's premises—

The Court held, that the right claimed by the declaration being a freehold right, and, even if considered as an easement only, and not an interest in the land, that it could not be created without deed, the plaintiff was properly nonsuited.

DOE *d.* PELL *v.* JEYES, T. T. 1831. K. B. 1 *B. & Ad.* 593.

Where the terms of a grant are general, a reversionary interest will pass;

A PARTY, entitled under a settlement to an estate at W. for his life, remainder, with a reversion in fee, after certain limitations, to his wife and eldest son for life, his son's wife and their children, by deed expressing his intention of advancing his two sons, granted the estate at W., and all other messuages, lands, &c., at W. and elsewhere, and the reversion &c., and all his estate and interest whatever, to the use that he should receive thereout an annuity of £—— for his life, and that after his decease his eldest son should receive thereout an annuity of £—— for his life, and subject to the said annuities, to the use of his youngest son in fee; and by the same deed, in consideration of the youngest son covenanting to pay £—— to his elder brother within three months after his, the settlor's, death, he also assigned all his goods, &c., to his younger son, absolutely. The elder son and his wife survived, but died before the action commenced, never having had any issue.

The Court held, that the terms of the grant being general, and there being nothing to exclude this reversionary estate from their general operation, it passed by the deed.

* Although the King can never be put out of possession, in point of law, by the wrongful entry of a subject, yet there may be an adverse possession, in fact, against the Crown; therefore, after such an adverse possession by a subject for twenty years, the Crown could only recover the land by an information of intrusion; consequently, ejectment would not lie at the suit of the grantee of the Crown, notwithstanding the rights of the Crown are not barred by the Statute of Limitations. (*Doe* d. *Wall* or *Watt* v. *Morris*, 2 Scott, 276).

ARKWRIGHT *v.* COUTRELL, H. T. 1838. K. B. 2 *N. & P.* 582; S. C. 7 *Ad. & E.* 565.

but a grant of an office to a party disqualified by interest from holding it is void.

AT the trial, a grant, dated 17th November, 1827, was produced in evidence, whereby the King, as lord of the Duchy of Lancaster, granted to the plaintiff the lot and cope and the mineral rights belonging to him, and also the office of bar-master, with all fees, profits, commodities, and emoluments to the same belonging, to hold the said office for the term of thirty-one years, at the rent of 5*l.* a year for the said office. On the question whether the plaintiff could also hold the officeof bar-master—

Per Cur.—The office of bar-master is incompatible with the lease of the lot and cope. It is an office of trust and confidence, and therefore, independently of the nature of the trust, the difficulty cannot be removed by the plaintiff's appointment of a deputy. If two incompatible offices be granted by one instrument, it might be difficult to say which would be void; but that is not the present case. The grant of this office is void, because the party cannot, in contemplation of law, satisfactorily perform the duties of the office, having a direct interest to violate them.

MATTOCK *v.* KINGLAKE, M. T. 1838. K. B. 1 *P. & D.* 46.

And where A. agreed to allow an annuity to the grantee of an office, whilst he should be deputy, he cannot, on being appointed to the office himself, avoid the payment of the annuity.

THE steward of a manor surrendered his office to the lord upon an annuity, which was secured by the lord to him. The lord appointed a successor to hold during his pleasure, who, in consideration of such appointment, promised to pay, out of the fees of the office, the annuity, and to indemnify the lord from the payment so long as he should execute the office, either by himself or his deputy, to be approved of by the lord. He afterwards received a grant of the office for life by deed.

The Court held, that his contract was not thereby determined, but that he was bound still to pay the annuity.

Growing Crops*. See tits. *Account stated—Fixtures.*

Guarantee.

See, also, *Statute of Frauds.*

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* Upon a verbal agreement for the sale of growing crops, and part of them being drawn, the purchaser promised to pay the amount before he drew any more, but which he did not do:—Held, that that sum was recoverable on the account stated. (*Pinchon* v. *Chelcott*, 3 C. & P. 236).

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I. RELATIVE TO THE FORM OF, AND WHAT AMOUNTS TO A GUARANTEE.

Peate *v.* Dicken, M. T. 1834. Ex., 1 *C., M. & R.* 422; S. C. 3 *D. P. C.* 171; S. C. 5 *Tyrw.* 116.

A guarantee is not void because it is dated on a Sunday.

In an action on a guarantee, it appeared that the undertaking was given by the defendant, an attorney, for his client, dated and executed on a Sunday. On demurrer to a plea that such agreement was void, under 29 Car. 2, c. 7—

The Court held, 1st, that it was not an exercise of his ordinary calling, within the statute; 2ndly, that such a plea need not conclude contra formam &c.

Peate *v.* Dicken, M. T. 1834. Ex. 1 *C., M. & R.* 422; S. C. *D. P. C.* 171; S. C. 5 *Tyrw.* 116.

If two memorandums form but one, one stamp is sufficient.

In assumpsit on a guarantee, an agreement, duly stamped as such, was put in evidence, and referring to another as the consideration for its execution. The latter was also produced.

The Court held, that the latter might be read, though not stamped, and though the former was not stamped with a stamp of 1*l.* 15*s.*, the number of words in the two together not amounting to 1080.

Bentham *v.* Cooper, M. T. 1840. 5 *M. & W.* 621.

A guarantee, merely that the

The defendant having become by deed a surety for his brother for goods supplied by M., whom plaintiff had succeeded in his busi-

guarantor will hold himself liable for £— until a full statement of A.'s affairs is made out, is void as a guarantee.

ness, by letter acknowledged his readiness to become surety to the plaintiff, also adding, "In the meantime, I shall hold myself responsible to you for 200*l.*, in the event of his inability to meet it, to be recovered upon the full statement of his affairs being laid before me; and such proving satisfactory, I then enter into the surety you require."

The Court held it no guarantee, not declaring a sufficient consideration.

DIXON *v.* HATFIELD, H. T. 1825. C. P. 2 *Bing.* 439.

A promise to pay for work to be done out of a particular fund, is an original, not a collateral contract*.

THE defendant having agreed with a person, who afterwards became bankrupt, that if he would furnish J. S. with timber to complete the carpenter's work of the defendant's house, he would pay the bankrupt 50*l.* when the work was completed. In an action by the assignee—

The Court held, that he was entitled to recover, although the timber was furnished by the bankrupt before the contract was entered into between him and the defendant; and although the work was not entirely completed by J. S., as the terms of the contract had been substantially complied with, it was sufficient to entitle the plaintiff to recover for goods sold and delivered. Held, also, that the guarantee is not an undertaking to pay the debt of a third person, but that the defendant would pay the bankrupt on the completion of the work out of a particular fund, in case he would furnish timber to J. S. for that purpose.

ANDREWS *v.* SMITH, M. T. 1835. Ex. 2 *C. M. & R.* 627: S. C. 1 *Tyrw. & G.* 173.

So, an undertaking to pay the plaintiff out of proceeds to come to the hands of defendant, be-

A SURVEYOR, who was employed to superintend a builder and to pay him the money due for his work, promised a third party that if he would supply goods to the builder for the work, he would pay him the amount of their value out of the money which should become due to the builder, if the builder should give him an order to do so. Plea, that the supposed promise therein mentioned was a

* Where the substance of several letters amounted to an offer by P. to assist, if M. would write a line to say, that the money he would have to pay B. for work to be done at Christmas should be given to P., which was acceded to by M.:—Held, to be an engagement to answer for the debt of another. Quære, if such letters, not containing 1080 words, would, under 55 Geo. 3, c. 184, require a 35*s.* stamp? (*Parkins* v. *Moravia*, 1 C. & P. 376).

A suit in Chancery was pending between A. and B., which C. conducted for A., as A.'s attorney. An agreement was made between B. and C., with the consent of A., purporting that, in consideration of the suit being put an end to, B., the defendant in equity, promised to pay C., the attorney, the costs due to him from A., the plaintiff in equity:—Held, that this was an agreement by B., the defendant, to pay the debt of another, and therefore that it ought to be in writing. (*Tomlinson* v. *Gill*, 1 N. & P. 588; S. C. 6 Ad. & E. 564).

But B., holding A.'s warrant of attorney for 340*l.*, signed judgment thereon and sued out a fi. fa. A. having other creditors, his brother-in-law, C., looked into his accounts, and with the consent of B. and the rest of the creditors, had all A.'s property conveyed to him, upon his undertaking to pay A.'s creditors in full. B. relinquished his execution against A.; but, after waiting some years for payment of his debt, was eventually obliged to sue C. On objection, that the defendant's promise was to answer for the debt, default, or miscarriage of another, and should therefore have been in writing:—Held, that it was an original promise, and not within the meaning of the Statute of Frauds. (*Bird* v. *Gammon*, 3 Bing. N. S. 883; S. C. 5 Scott, 213).

special promise to answer for the debt of another person, and that no agreement in respect thereof, or any memorandum or note thereof, was in writing signed by the defendant, or any other person by him so thereunto lawfully authorized, according to the form of the statute, &c.

longing to a third party, is an original and not a collateral contract,

The Court held the agreement to be an original promise, and not an undertaking to be answerable for the debt of another, so as to require a note in writing. Therefore, the builder having given the order, the surveyor was held liable to an action for not paying the money over agreeably to his engagement.

II. RELATIVE TO THE PARTIES TO.

DRY *v.* DAVY, E. T. 1839. Q. B. 10 *Ad. & E.* 30; S. C. 2 *P. & D.* 249.

A GUARANTEE was given to a firm consisting of three persons; one of them retired from the partnership, the two others supplied goods; one of these two died, and the survivor brought an action on the guarantee.

A guarantee given to a firm is discharged by a change of partners.

The Court held, that the action did not lie, for that either the retirement of the first partner put an end to the instrument, or he, being still alive, ought to have joined in the action.

HALL *v.* ASHURST, T. T. 1833. Ex. 1 *C. & M.* 714; S. C. 3 *Tyrw.* 420.

IN assumpsit, it appeared that the defendant, who was the solicitor to the London creditors of a bankrupt, wrote to the plaintiff, the solicitor of the country creditors, a letter, wherein he stated that he was willing, "on behalf of the London creditors," to bear two-thirds of the expenses of the attendance of a barrister to resist a particular claim, and of investigating the accounts, concluding with the words, "I hereby undertake to bear and pay, on behalf of these creditors, two-thirds of the expenses incident thereto accordingly." A further attendance of a barrister becoming necessary, he again wrote, "I shall have no objection to bear, as before, the proportion of expense of the barrister attending the meeting stated in your letter."

A guarantee by an attorney, "I hereby undertake to bear and pay, on behalf of these creditors, two-thirds of the expenses," &c., renders him personally liable.

The Court held, that the defendant was personally liable to the plaintiff for the two-thirds of the expenses he had so undertaken to pay.

III. RELATIVE TO THE CONSIDERATION *.

HAWES *v.* ARMSTRONG, E. T. 1835, C. P. 1 *Bing. N. S.* 761; S. C. 1 *Scott*, 661.

DECLARATION on an undertaking given by the defendant in the following words: "Inclosed I forward you the bills drawn for A.

The consideration must be express,

* If a person, employed by the administrator of a deceased debtor to wind up the concerns of the deceased's business, give an undertaking to a creditor of the de-

upon, and accepted by D., which I doubt not will meet due honour; but, in default thereof, I will see the same paid." Subscribed by the defendant.

The Court held, that an action could not be maintained upon such undertaking against the defendant, inasmuch as the consideration for such promise did not expressly appear; consequently, that the case was not within the Statute of Frauds, sect. 4.

COLE *v.* DYER, E. T. 1831. Ex. 1 *C. & J.* 461; S. C. 1 *Tyrw.* 304.

certain, and not ambiguous;

AN action being pending between A. and B., the defendant joined with the latter in a memorandum, which, after stating the parties to the action, and the amount of the debt and costs, was in the words:—"We jointly and severally undertake and agree to pay G. C. (the attorney of the plaintiff in the action) the debt and full costs in this action, provided, on or before the —— day of ——, ——, the sum of —— be not paid to the said G. C. at his office, as the attorney for the said plaintiff."

The Court held, that the consideration for which the guarantee was given being uncertain, whether for staying the action, or for giving time of payment, was ambiguous, and not sufficiently express to take it out of the Statute of Frauds.

See Saunders v. *Wakefield*, 4 *B. & A.* 595; *Wain* v. *Warlters*, 5 *East*, 10.

MORLEY *v.* BOOTHBY, E. T. 1825. C. P. 3 *Bing.* 107.

and must appear on the face of the undertaking.

ACTION on a note in these terms:—" Messrs. M. & Co. (plaintiffs) do hereby promise that your draft on C. & Co., due at M.'s at six months, on &c., shall be paid out of money to be received from P.; say £——." Signed " C. and B." (defendants).

The Court held, that no sufficient consideration appearing on the face of the instrument for the promise of C. and B., it was, as against them, void by the Statute of Frauds.

ceased to furnish money to meet an acceptance which such creditor has given, in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt. (*Maund* v. *Waterhouse*, H. T. 1827, N. P., 2 C. & P. 579).

The widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licenses of the house, as a security for the payment of his bill. A., one of the firm of the distillers who supplied the house with spirits, by arrangement with the widow took out administration. B., the other partner in the firm, promised the undertaker that, if he would give up the licenses to him, he would pay his bill for the funeral:—Held, that the undertaker, having given up the licenses to B., might recover his bill against B., although the widow was his original employer, and although he made out his account charging the administrator as his debtor. (*Walker* v. *Taylor*, M. T. 1834, N. P., 6 C. & P. 752).

Where a plaintiff discharges one of two joint debtors, the other has a right to be discharged; and therefore, a promise by a third person to pay the debt, in order to obtain the discharge of the defendant in custody, is void for want of consideration. (*Herring* v. *Dobell*, T. T. 1840, B. C., 8 D. P. C. 604).

NEWBERY *v.* ARMSTRONG, M. T. 1829. C. P. 6 *Bing.* 201; S. C. 1 *M. & M.* 387; S. C. 4 *C. & P.* 59.

IN assumpsit it appeared that the plaintiff being about to take one J. C. into his service, the defendant gave him the following guarantee: viz. "I do hereby agree to bind myself to be security to you for Mr. J. C., late in the employ of Mr. P., for whatever (while in your employ) you may intrust him with, to the amount of 50*l.*, in case of any default, to make the same good."

I agree to bind myself to you for A. B., "for whatever you may trust him whilst in your employ," discloses a sufficient consideration.

By the Court.—The Statute of Frauds requires an agreement or undertaking, to be answerable for the debt or default of a third person, to be in writing. On the construction of this statute it has been held, that the consideration for the promise, as well as the promise itself, must appear on the face of the writing. The question then is, whether the consideration in this case appears either expressly or by fair implication. We think that the consideration does so appear.

SHORTREDE *v.* CHEEK, T. T. 1834. K. B. 3 *M. & R.* 866; S. C. 1 *Ad. & E.* 57.

IN assumpsit, the guarantee was in the terms: "You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive the amount of it together with my son's memorandum, making together 45*l.*"

So, withdrawing a promissory note is a sufficient consideration.

The Court held, that the withdrawing the note was a sufficient consideration, although the amount was not stated, there being no evidence of any other note, and that it was not necessary to produce the memorandum.

GILMOUR *v.* KING, E. T. 1833. Ex. 1 *C. & M.* 612; S. C. 3 *Tyrw.* 581.

"SIR,—In consideration of your having consented to become assignee, under a commission of bankrupt against Charles Edward Gaddera, and John Charles Edwards, at my express wish and to oblige me, I hereby agree to hold you harmless and indemnified against all costs, charges, and expenses, to which you may become liable, in consequence of being such assignee. I am, Sir," &c.

And a party becoming assignee in consideration of an indemnity is not illegal*.

It appeared that, at a meeting of creditors under a fiat of bankruptcy for a choice of assignees, the plaintiff was applied to to become the assignee, no other creditor being willing to undertake that office. The plaintiff at first refused, saying he would not incur any risk or liability of loss; but he consented on receiving the above indemnity from the defendant. The action was brought to recover costs, charges, and expenses, to which he had become liable in his character of assignee.

The Court held, such indemnity is not invalid as being against the policy of the bankrupt law.

* Where the defendant, an attorney, requested the plaintiff to execute a bail-bond to the plaintiff, for a client of the defendant, and promised to indemnify him:—Held, that it was a promise to answer for the debt or default of another, within the 4th sect. of the Statute of Frauds. (*Green* v. *Creswell*, 2 P. & D. 430; S. C. 10 Ad. & E. 453).

DUTCHMAN *v.* TOOTH, T. T. 1839. C. P. 5 *Bing. N. S.* 577.

A guarantee, I undertake, &c. "in consideration of 2*s.* 6*d.* paid me," is sufficient.

THE defendant signed a memorandum in the terms: "I hereby guarantee the payment of all goods consigned to T., in consideration of 2*s.* 6*d.* paid me."

The Court held it sufficient within the Statute of Frauds, the fair intendment being that the 2*s.* 6*d.* was paid by the plaintiff to the defendant.

EMMETT *v.* KEARNS, T. T. 1839. C. P. 7 *D. P. C.* 630; S. C. 5 *Bing. N. S.* 559; S. C. 7 *Scott*, 687.

So, an indorsement on a letter, "I will see the bill paid for A.;"

IN assumpsit on a guarantee, it appeared that a debt being due to the plaintiff from a client of the defendant, an attorney, the latter inclosed to the plaintiff a bill of exchange, accepted by his client, for the amount, telling him that he may safely trust his name to it as drawer, and that he will see it paid.

The Court held, that there was a sufficient consideration in the forbearance of the plaintiff to proceed until the bill became due, to render the defendant liable.

KENNAWEY *v.* TRELEAVER, M. T. 1839. Ex. 5 *M. & W.* 498.

or, "in case A. should make default in his capacity of agent and traveller to you," is sufficient.

"MESSRS. K. & Co.—Gentlemen, I hereby guarantee to you, Messrs. K. of E., the sum of 250*l.* in case Mr. P., of Plymouth, should make default in his capacity of agent and traveller to you."

The Court held, the consideration for the defendant's agreeing to pay the sum of 250*l.* was the future employment of P. as agent and traveller. The parties contemplated a fault in his capacity as such; and it is difficult to see how such default could take place unless he continued as agent and traveller. It is suggested, that if P. received money as agent, and was dismissed before he made any default, and afterwards made default, that that would be a default within the terms of this instrument. We think that is not the case; and that the default must take place whilst he continues agent and traveller.

HAIGH *v.* BROOKS, H. T. 1840. Q. B. 2 *P. & D.* 477.

And the words, in consideration of your being "in advance" with A. B., "and giving up a prior guarantee," I undertake" &c., are sufficient.

THE defendant had given to the plaintiff a guarantee, in these terms: "In consideration of your being in advance to Messrs. J. L. & Sons, in the sum of 10,000*l.* for the purchase of cotton, I do hereby give my guarantee for that amount." By a second instrument made in consideration of the surrender of the first, he promised the plaintiffs to see certain bills of J. L. paid at maturity.

The Court held, that whether or not the consideration, in the first instance, was sufficient to render it available, still, that the giving up of a document which the plaintiff might have retained, and which the defendant desired to possess, was a sufficient consideration for the guarantee.

RAIKES *v.* TODD, M. T. 1838. K. B. 1 *P. & D.* 138.

But, a consideration stated to be "money already advanced, or to be advanced," too uncertain.

IN assumpsit on the following guarantee: "Messrs. R., I hereby undertake to secure to you the payment of any sums of money you may have advanced, or may hereafter advance, to Messrs. D. & Co., on their account with you, commencing from November 1st, 1831, not exceeding 2000*l.*, J. T."—

Held to be insufficient as a guarantee for the past advances, as no consideration for the promise was expressed, or was necessarily to be implied.

CHANCY *v.* PIGGOTT, H. T. 1835. K. B. 4 *N. & M.* 496; S. C. 2 *A. & E.* 473.

A parol promise that if A. would abandon his lien on goods, B. would pay the debt, seems within the statute.

IN an action of assumpsit on a promise, that, in consideration plaintiff would forego a lien on goods which he had of a third person, defendant would pay the plaintiff 5*l.* Plea, that the supposed promise was a special promise to answer for the debt of another, and that there was no memorandum wherein the consideration was set forth, but that it was as follows: (then setting out an agreement which primâ facie was within the statute). Upon demurrer—

The Court held, that this was sufficiently indentified with the agreement declared upon, without an express averment that it was the only agreement, and that it was a good plea in bar to the action.

JAMES *v.* WILLIAMS, H. T. 1834. K. B. 3 *N. & M.* 196; S. C. 2 *D. P. C.* 481.

"As you have a claim on A. B. for £—, I hereby undertake to pay" &c., is void, for want of consideration.

THIS was an action on a guarantee, in these words: "As you have a claim on my brother for 17*l.* 10*s.* for boots and shoes, I hereby undertake to pay you the amount within six weeks from this day, say the 14th of January, 1833." That was dated the 1st of December, 1832.

The Court held that the agreement was not sufficient. An agreement to pay the debt of another must not only be in writing, but must contain the consideration, either in express terms or by necessary implication, and as a matter of certainty; and it is not sufficient that a consideration may be fixed upon by conjecture merely.

HANKEY *v.* COBB, E. T. 1841. Q. B. 1 *Gale & D.* 47.

A guarantee, in consideration of signing a bankrupt's certificate, is void.

WEST being a creditor of one Martin, a bankrupt, and having frequently refused to sign his certificate, was induced to do so upon receiving the following guarantee from a third person: "Mr. Joseph West, in consideration of your selling and delivering goods to Mr. Martin, (the bankrupt), I hereby guarantee the payment of the same after the usual credit of two months shall have expired, to the extent not exceeding the sum of 150*l.*, at any time during your dealings together. G. Cobb." In an action upon this guarantee, to recover 150*l.* for goods supplied—

The Court held, that the plaintiff was not entitled to recover, as this was a contract or security operating as a consideration to induce a creditor to sign the bankrupt's certificate, and therefore void under the stat. 6 Geo. 4, c. 16, s. 125.

BUSHELL *v.* BEAVAN, H. T. 1833. C. P. 1 *Bing. N. S.* 103; S. C. 4 *M. & Scott*, 662.

Although a memorandum be not a guarantee, but an

IN an action for damages for breach of an agreement by defendant to procure T. M. to sign a guarantee, and deliver the same to the plaintiffs within a stated time, it appeared that, disputes having arisen between the plaintiffs, the owners, and the charterer of a ship of the

original undertaking, a good consideration must appear on the face of it, under the Statute of Frauds.

plaintiffs, and not being able to give the security required, the latter had refused to permit the ship to sail; upon which the defendant, to obtain the signature of T. M. to a guarantee, reciting that the charterer had hired the ship for six months, and so much longer as the intended voyage might require, and had paid or secured the freight for six months, and was about to leave England, did "guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months."

The Court held, 1st, that the contract of the defendant was an original contract, and not an undertaking for the debt or default of another; and 2nd, that such intended guarantee was within the Statute of Frauds, and no sufficient consideration expressed upon the face of it; and that, if an action had been brought upon it against T. M., it must have failed; and that the defendant, although liable to a verdict for breach of the contract, was yet liable only to nominal damages; 3rd, with respect to the contract, considered as an independent guarantee, yet not having been executed until after the ship had sailed, it was given without any consideration whatever, and therefore invalid.

IV. RELATIVE TO THE ACCEPTANCE AND RETRACTING OF GUARANTEE.

MOZLEY *v.* TINKLER, H. T. 1835. Ex. 1 *C., M. & R.* 692; S. C. 5 *Tyrw.* 416.

To bind the guarantor, the guarantee must be acknowledged, or notice given so as to complete the contract*.

IN assumpsit on a guarantee, in these words: "Mr. F. informs me that you are about publishing an arithmetic for him and another person. I have no objection to be answerable as far as 50*l.*; for my reference, apply to Messrs. Brooks & Co., of this place."

The Court held, that this was only a proposal, which required an answer, and that the testimony of Brooks, the referee, as to the defendant's solvency, which was written on the letter, was not sufficient to prove their assent; and therefore, nothing having been done in answer, the plaintiffs could not maintain their action.

V. RELATIVE TO THE CONSTRUCTION OF.

KAY *v.* GROVES, T. T. 1829. 6 *Bing.* 276; S. C. 4 *C. & P.* 72.

If there be two deliveries, the question will be, whether the second was un-

ASSUMPSIT on the following guarantee: "I hereby agree to be answerable to K. for the amount of five sacks of flour, to be delivered to T., payable in one month. Nov. 18." The plaintiff accordingly, on the 19th, delivered five sacks to T., and made a like

* If a person offers a guarantee, and still more, if he signs a guarantee by which he makes himself liable, and that be sent to the other party, such other party, if he means not to accept the guarantee, is bound expressly to dissent within a reasonable time; and if he keeps the guarantee an unreasonable time, he is bound to accept it, just the same as if he had assented to it by words; and if he has ever accepted it, either by word or by act, he cannot afterwards retract. (*Pope* v. *Andrews*, H. T. 1840, N. P., 9 C. & P. 564).

delivery on the 21st. On the 24th, T. returned part of the first delivery, as of bad quality.

der a new contract, the first being returned as of bad quality, so as to fix the guarantor.

The Court held, that it was properly left to the jury to say whether the second delivery was under a new contract or not, and whether the whole quantity guaranteed had been furnished on the 19th. The defendant's liability began to run on the 19th, and could not be prolonged by a subsequent delivery, without evidence of express assent on his part.

SIMPSON *v.* MANLEY, M. T. 1831. Ex. 2 *C. & J.* 12; S. C. 2 *Tyrw.* 86.

ASSUMPSIT on the following guarantee: "Gentlemen,—Our relation, Mr. Thomas Manley, having intimated to us that he is about to make some purchases of goods from you, we beg to say, that if you give him credit we will be responsible that his payments shall be regularly made, to the extent of 1000*l.*, from this period to the 1st of June, 1831. We are, gentlemen, your very obedient servants."

The word "credit," in a guarantee, means to trust the third party*.

Per Cur.—This is purely a question of construction; and therefore, in order to form our judgment of the intention of the sureties, we can look only to the language of the instrument. The language of the sureties is, "We will hold ourselves responsible, if you will give Thomas Manley credit"—not, "as heretofore," or "for the time usually allowed by the custom of the trade," or for any other particular specified period, but generally, if you will give him credit. What does this import? Why, it plainly means, if you will trust him. There is nothing on the face of this guarantee to bind the parties to the old mode of dealing, or to a dealing upon the trade credit; and it seems to us that we are not carrying the language beyond the reasonable intention of the instrument, in deciding that the defendants are liable.

OGDEN *v.* ASPINALL, E. T. 1828. K. B. 7 *D. & R.* 637.

A. HAVING employed H. as his agent abroad, to make shipments of cotton on his account, by letter informed B. & P. of such employment, and that it would be of advantage to him to have his bills negotiated through their house, and requesting them to honour H.'s drafts to the amount of goods he might send to them for sale on A.'s account, and engaging that his bills on A., so transmitted, should be regularly accepted and paid.

Guarantor only liable on securities clearly falling within the terms of the guarantee.

The Court held, that such guarantee could not be restricted to bills drawn in respect of cottons purchased for and on account of A.; but that B. & Co. could only recover against A., on such guarantee, bills proved to have been received from H. in the course of business from him, and under his representation that they were drawn to meet shipments on A.'s account.

* Where the defendant undertook in writing, that, in consideration of the plaintiff signing a consent to supersede the defendant's commission, he would, in the event of his recovering certain property, liquidate his claim, although not legally liable:—Held, that the agreement implied a promise to take some step for the recovery of the property. (*Edmunds* v. *Wilkinson*, H. T. 1836, 7 C. & P. 387).

HEMMING *v.* TRENERY, T. T. 1835. Ex. 2 *C., M. & R.* 385.

Under a guarantee to pay for goods when certain described works were finished:—Held to create no liability until the happening of that event.

IN assumpsit, it appeared that a builder having contracted to perform certain works for government, his sureties entered into a contract to guarantee to a person who supplied him with bricks payment out of the amount of the money payable by government to the builder. He performed part of the work, and received some money, which the seller of the bricks allowed him to retain. He was employed to do some extra work, and ultimately broke his contract with government. Other persons were employed to complete it, and, with the consent of the sureties, the money paid to them was deducted from the amount payable under the contract, and the balance did not cover the extra work.

The Court held, under these circumstances, first, that the seller of the bricks could not treat the money paid to those persons as paid to the contractor, and therefore, as payment had not been made to him, the guarantee was not broken; secondly, that the guarantee did not attach, unless the whole amount was paid over by government.

STEPHENS *v.* PELL, E. T. 1834. Ex. 2 *C. & M.* 710; S. C. 4 *Tyrw.* 6.

A guarantee to pay a debt out of proceeds of a distress renders the party liable upon proof of goods producing sufficient, although there be previous claims on the proceeds*.

ASSUMPSIT on a guarantee, whereby the defendant, as assignee of one R. L., a bankrupt, undertook, in consideration of the plaintiff's withdrawing the person put in possession of R. L.'s effects under a distress for the sum of 350*l.* for rent due to the plaintiff, that the said sum of 350*l.* should be paid to the plaintiff "out of the sale of the produce of the said effects." On demurrer to the plea of the defendant, the plaintiff obtained judgment. On the execution of a writ of inquiry before the undersheriff, the guarantee was proved, and it appeared that the effects seized were of the value of 600*l.* The defence set up was, that there were prior executions, and that it was not proved that, after those were satisfied, any surplus remained to meet the plaintiff's demand. The jury assessed the damages at one shilling only.

Parke, B.—The defendant's engagement is, that, if the plaintiff withdrew the distress, he will pay the 350*l.*, provided the effects produce sufficient. It is not a contract to indemnify, but a positive engagement to pay if the goods are sufficient, and he is bound by it.

SKIN *v.* BROOK, K. B. 1 *B. & Ad.* 129.

Where a security, and not a payment, is the consideration, the party may

IN assumpsit on a guarantee, it appeared that the plaintiff having given to defendants two notes and a cognovit, the defendants by a guarantee, in consideration of the money so secured to be paid to them, undertook to indemnify the plaintiff against a certain bill.

* Defendant, attorney of O., authorized plaintiffs, as brokers, to distrain the goods on A.'s premises for rent due to O., whereupon the distress was made. Some of the goods being privileged from distress, and claimed by the owners, plaintiffs required an indemnity, which defendant gave, on the part of O., and afterwards said he would give a further guarantee. The owners of the privileged goods having sued and recovered against plaintiffs:—Held, that defendant was liable to make good the loss they had sustained. (*Toplis* v. *Green*, 5 Bing. N. S. 636).

The Court held, that the plaintiff might sue on the guarantee, although the notes had not been paid, the security, and not the payment, being the consideration of the guarantee.

sue before payment.

MUSKETT *v.* ROGERS, M. T. 1839. C. P. 5 *Bing. N. S.* 728; S. C. 8 *Scott*, 51.

THIS was an action on a guarantee, undertaking payment of the debt of B., and was conditioned to be void if the party did not avail himself to the utmost of a bill held by him as a deposit, and also in case any thing should prevent the defendant from receiving and retaining the proceeds of an execution he had levied on the goods of B.

The condition in a guarantee that the party must "do the utmost," does not compel him to go to law with an insolvent in prison.

The Court held, that it was not avoided by the plaintiff not putting the bill in suit against the acceptor, who was an insolvent and in prison, nor by part of the goods being withdrawn, which being the goods of other parties had been improperly taken in execution.

VI. RELATIVE TO CONTINUING GUARANTEES.

NICHOLSON *v.* PAGET, M. T. 1832. Ex. 1 *C. & M.* 48; S. C. 3 *Tyrw.* 164; S. C. 5 *C. & P.* 395.

ASSUMPSIT on the following guarantee:—"184, Piccadilly, 25th May, 1830. Mr. Nicholson, Sir,—I hereby agree to be answerable for the payment of 50*l.* for Thomas Lerigo in case Thomas Lerigo does not pay for the gin, &c., he receives from you, I will pay the amount. I am, Sir, your most obedient servant, &c."

Where a specific sum is named as the extent of liability, it will control subsequent words indicating a continuous obligation*.

Per Cur.—In this case, although we took time to consider, we did not entertain any great degree of doubt. The question is, whether this is a continuing guarantee, or is terminated on a payment of the sum of 50*l.* for goods supplied to that amount. We think that, as a specific sum is named limiting the liability, it controls the subsequent words indicating a continuing liability.

MAYOR *v.* ISAAC, T. T. 1840. Ex. 6 *M. & W.* 605.

ASSUMPSIT on the following guarantee:—"London, 30th November, 1838. Sir,—In consideration of your supplying my nephew, Mr. A. L. Vogel, with china and earthenware, I hereby guarantee the payment of any bills you may draw upon him on account thereof, to the amount of 200*l.*"

"Any bill you may draw on him on account thereof," is a continuing guarantee.

Per Cur.—We are all of opinion, that this is a continuing guarantee. There is some difficulty in reconciling the cases on this subject; and the reason is, that they proceed on different principles; some Judges declaring that a guarantee should be construed strictly

* Where the appellants gave a guarantee to a firm consisting of certain persons for monies advanced to L.:—Held, that it did not extend to advances after the introduction of other parties into the firm; and that payments made by the firm were to be applied to the balance due to the original firm at the date of the alteration. (*Spiers* v. *Hanstown*, 4 Bligh, P. C. 575).

against the party giving it; others, as in *Nicholson* v. *Paget*, (ante, 153,) that the party taking it should see that his security is a good one. The general principle is, that a person who makes an instrument should so express himself that if he is not liable his non-liability may appear plainly upon the instrument. The party who furnishes goods on the faith of a guarantee is entitled to have it construed in his favour.

ALLAN *v.* KEANING, M. T. 1832. C. P. 9 *Bing.* 618; S. C. 2 *M. & Scott*, 768.

Words, shewing that a guarantee is given in reference to further purchases, will be construed as continuing.

THE terms of an undertaking, after reciting, that "C. is indebted to you in a sum of money, and may have occasion to make purchases from you as an inducement to you to sell him such goods, and continue your dealings with him, I hereby guarantee you in the sum of £——, in default on the part of C., for two months."

The Court held this to be a continuing guarantee.

HARGRAVE *v.* SMEE, M. T. 1829. C. P. 6 *Bing.* 244.

A guarantee to pay according to the custom of the trade, if a monthly auditing, will be deemed a continuing guarantee.

IN assumpsit on the following guarantee:—"For the payment of goods to be delivered to J. and E. S., according to the custom of their trading with the plaintiff, in the sum of 200*l.*" The custom of the trade was to make up monthly accounts of goods delivered, to be paid for by bills at three months.

Per Cur.—If a limited construction were put upon this instrument, it would not have the beneficial effect that was contemplated by the parties. If, on goods to the extent of 200*l.* being furnished and paid for at the end of the first month, the liability of the defendant ceased, the evident intention of the guarantee would be defeated. We therefore think, that, to give effect to the meaning apparent on the face of this guarantee, we must hold it to be a continuing guarantee.

VII. RELATIVE TO BEING GOOD IN PART AND BAD IN PART.

WOOD *v.* BENSON, M. T. 1831. Ex. 2 *C. & J.* 94.

A guarantee may be good in part and bad in part.

"I DO hereby engage to pay the Directors of the Manchester Gas Works, or their collector, for all the gas which may be consumed in the minor theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. N.; and I do also engage to pay for all arrears which may be now due."

The Court held, 1st, that it is not an entire agreement; but the promise to pay for the future supply of gas, is separate and distinct from the promise to pay the arrears: and 2ndly, that although the contract cannot be sustained in toto, yet that it may be sustained in part, provided the declaration be so framed as to enable you to meet the valid part only.

VIII. RELATIVE TO THE DISCHARGE OF THE GUARANTOR.

PIDCOCK *v.* BISHOP, H. T. 1825. K. B. 3 *B. & C.* 605; S. C. 5 *D. & R.* 505.

THE defendant gave a guarantee to be answerable for 200*l.* worth of iron. It was afterwards discovered that the vendors and the vendee before the guarantee was given had entered into a private bargain, that the vendee should pay a greater sum than the market price for the iron as it was delivered, and that the excess should go in liquidation of an old debt due to one of the vendors.

The party guaranteeing must be informed of any private terms between the principal affecting or varying his responsibility*.

Per Cur.—We are all of opinion, that a person giving a guarantee ought to be informed of every circumstance which may vary the degree of his responsibility. It is clear, as in the case of a composition deed, that a contract, which is a fraud upon a third person, is void on that account as between the parties to it. The object of a person becoming surety for another is to do him a service, but in this case this private bargain would defeat that intention.

HALL *v.* HADLEY, T. T. 1828. C. P. 5 *Bing.* 54; S. C. 2 *N. & P.* 136.—S. P. EVANS *v.* WHYLE, M. T. 1828. C. P. 5 *Bing.* 485.

THE plaintiff declared on a guarantee by the defendant to pay for coals supplied to N. H., in case N. H. should not pay the same within one month after the expiration of a credit of two months from the delivery. The evidence was, that the coals were delivered daily, and that, at the end of each month, N. H. gave his acceptance at two months' date for the month's supply.

Hence, creditors dealing with debtors on different terms than those embodied in guarantee, discharges guarantor.

Per Cur.—The very spirit and essence of the guarantee was, that at the expiration of two months from the delivery the debt should accrue, and if a longer credit be given than the surety contemplated the surety is thereby discharged. The evidence went to shew, that, if coals were delivered on the first of the month, the credit on such delivery would be three months. The agreement did not say any thing about the custom of the coal trade, nor can any custom contravene a positive contract. There was, therefore, a substantial deviation from the contract into which the defendant entered, and he has a right to take advantage of it.

* Upon a letter of guarantee given by defendant to plaintiff in the terms: "That P. C. shall faithfully and honestly discharge any duty assigned to or trust reposed in him;" and the plaintiff received him into his employ:—Held, that a sufficient consideration appeared on the face of the guarantee to bind the defendant. It appearing that the plaintiff employed the party, first, at B., and afterwards at Z., and that upon his removal from B. he was indebted to the plaintiff in a large sum; and by his accounts, it appeared on the face of them, that sums remitted whilst employed at Z. were remitted as the proceeds of sales there:—Held, that the Judge was not bound to direct the jury as matter of law, that such remittances were to be considered as in discharge of the former balance, but that he was right in leaving it to the jury, under all circumstances, to what account they were to be applied. (*Lysaght* v. *Walker*, 1 Dow. & C. 211). Where goods are supplied on terms of defendant paying for them, on failure by principal the renewal of a bill is not such a failure as was contemplated by guarantee, so as to discharge surety. (*Carr* v. *Browne*, 12 Moore, 62).

COOMBE *v.* WOOLF, E. T. 1831. C. P. 8 *Bing.* 156; S. C. 1 *M. & P.* 241.

Giving the debtor credit beyond the usual time exonerates the guarantor.

THIS was an action on the following guarantee to see the plaintiff paid, "for any porter you may supply to A., until you receive notice to the contrary from me;" and it appeared from the invoices that the course of the plaintiff's business was to give six months' credit, and then sometimes a bill at two months. The plaintiff having, without the knowledge of the defendant, allowed three months to elapse beyond the six, and then accepted a bill at two, virtually extending the credit to eleven months—

The Court held, that the surety was exonerated.

HOWELL *v.* JONES, T. T. 1834. Ex. 1 *C., M. & R.* 97; S. C. 4 *Tyrw.* 548.

Taking a bill is a giving time.

ON a guarantee in the terms,—"Please to open an account with and honour the cheques of B. on bill account, for whom I will be responsible." At the end of the third year the balance was £——, after which no fresh advances were made by the plaintiffs, and B. subsequently made a payment to them, and they took, without the knowledge or assent of defendant, an acceptance at three months for the balance.

The Court held to be such a giving time to the principal as exonerated the surety.

GORING *v.* EDMONDS, H. T. 1830. C. P. 6 *Bing.* 95; S. C. 3 *M. & P.* 259.

But, taking bills from the debtor without notice to the guarantor, until they are unpaid, does not discharge the guarantor.

BY memorandum, in April, 1825, for the purchase of timber, the defendant subscribed a guarantee for the payment, according to the conditions, in the event of the principal not doing so, and after payment of part, by bills and repeated applications, a bill was given by him for the residue, which was eventually dishonoured, and he became bankrupt in December 1827; but the defendant was never informed of such application, nor of the bill being given.

The Court held, 1st, that mere laches in the party secured did not operate as a discharge to the surety, unless amounting to fraud; and, 2ndly, that the judge correctly told the jury, that, in order to discharge the defendant, time must have been given under such circumstances, that the plaintiff must have lost his remedy against the original debtors.

COWPER *v.* SMITH, T. T. 1838. Ex. 4 *M. & W.* 519.

So, under the terms of a guarantee, that the creditor "may compound with the debtor," a release under a composition deed of the debtor, does not

ASSUMPSIT, on a written guarantee, given to the plaintiffs for goods to be supplied by them to one G. to the extent of 400*l.* The guarantee provided that the plaintiffs were to have full liberty to extend the period of credit to G., and to hold over or renew bills, notes, or other securities given by him, "and to grant to G. and the person liable upon such bills, notes, or securities any indulgence, and to compound with him or them respectively, as the plaintiffs might think fit, without the same discharging, or in any manner affecting the liability of the defendant, by virtue of the guarantee.

The declaration then averred the supply of goods exceeding the guarantee, of which sum 168*l.* was unpaid by G., of which the defendant had notice, and was requested to pay that sum, but had not done so. Plea, that after the debt was incurred by G., and before action brought, the plaintiffs became parties to a composition deed between G. and his creditors, whereby he assigned all his stock in trade, &c. for the benefit of his creditors, and that in consideration thereof the plaintiffs and the other creditors, parties thereto, granted a general release to G. of all debts and demands against him. The plea then averred, that the promise in the declaration was only made by the defendant as surety, and that the plaintiffs, by the deed, released G. without the privity of the defendant, and without notice. On demurrer—

discharge the guarantor.

The Court held, that under the express terms of the guarantee the security was not discharged by the release of the principal debtor.

HALL *v.* HALEY, H. T. 1835. K. B. 4 *N. & M.* 515.

A PARTY guaranteed for a certain amount, on condition that no application should be made to him, "but on failure of the plaintiffs' utmost efforts and legal proceedings to obtain the same from the principal." The principal made default in 1822, remaining in the country till 1824, without any means having been taken to arrest him, or by action to compel him to pay, until 1831, when he returned permanently to this country, and was arrested by the plaintiffs, and took the benefit of the Insolvent Debtors' Act in 1832.

So, where to render the guarantor liable "the utmost efforts and legal proceedings were to be used" against the debtor:—Held, that the debtor having left England not until after two years, the guarantor was discharged.

The Court held, that the plaintiffs were guilty of laches, in allowing the principal to remain in the country for two years without taking means to compel him to pay; and that the Statute of Limitations was a bar to the action against the executors of the surety, brought in 1829, on process issued in 1826, and continued on the roll.

SHIPTON *v.* CAPON, E. T. 1826. K. B. 5 *B. & C.* 378; S. C. 8 *D. & R.* 131.

A. BEING indebted to B., the latter agreed to accept the amount by instalments, C. undertaking to guarantee the payment of them. On the day after the first instalment became due, C. remitted to B. the amount, partly in bills not then due and partly in bank-notes; B. wrote acknowledging the receipt of the bills and notes, and said they should be placed to A.'s account.

Payments made by the guarantor, not in the terms of the undertaking, will, if accepted by the creditors, be a valid performance of the contract.

The Court held, that although he was not bound to accept the remittance so made, yet having done so, he had thereby waived all objections to the time, when it was sent, or the manner in which it was made up; and that he could not afterwards maintain an action against B. upon the ground of his having failed to pay the first instalment.

IX. RELATIVE TO THE REMEDY ON THE GUARANTEE.

(*a*) Parties to the action*.

GARRETT *v.* HANDLEY, M. T. 1824. K. B. 4 *B. & C.* 664; S. C. 7 *D. & R.* 144.

A guarantee given to one of several partners should be enforced by the firm.

A GUARANTEE was given to the junior member of a banking concern for the payment of a sum of money to be advanced. The money was taken from the partnership funds, and the borrower made a debtor in their books.

The Court held, that the junior partner could not maintain an action in his own name on the guarantee.

(*b*) Declaration.

CORBETT *v.* CONWAY, H. T. 1840. Ex. 5 *M. & W.* 653.

The declaration must accurately describe the guarantee†.

A COUNT stated a guarantee for the re-payment of bills, orders, cheques, or liabilities, drawn or subscribed by M. and E. It then averred an acceptance by the said M. and E. of a bill, and that they, "by a memorandum added to that acceptance, expressed the same to be payable at" &c.

The Court thought that the count was bad, for want of an averment that the bill was subscribed by M. and E.

HAIGH *v.* BROOKS, T. T. 1839. Q. B. 10 *Ad. & E.* 309.

The word "guarantee," in a declaration, does not imply a past advance.

DECLARATION in assumpsit, stating that the defendant promised, in consideration that plaintiffs, at his request, would give up to him a certain guarantee of 10,000*l.* on behalf of L., then held by

* An agreement between A. and B., the wife of A., and C., of the one part, and D., of the other, recited, that A., B., and C. had sued L., and obtained a cognovit from him; that W. was bail to the sheriff, and that the bail-bond was forfeited; that he had requested A., B., and C., to let L. be at large, and to forbear entering up judgment or proceeding against the bail or the sheriff till a certain day, on W.'s guaranteeing the security of L.'s person, if the money were not paid before that day; and the agreement further set forth, that it was understood and agreed that W. undertook and promised, that he W. would render L. on the day or pay the money, in consideration that A., B., and C. would so forbear. W. having broken the agreement, A., B., and C. declared jointly against W.; reciting the agreement, and averring performance on the part of A., B., and C.:—Held, that B. was entitled to join. (*Walls* v. *Nurse*, (in error), 1 Adol. & El. 65). So, E., as attorney for plaintiffs, executors of M., having sold an estate, to a share of the proceeds of which N. was entitled as legatee of M., and defendant claiming N.'s share of such proceeds under an agreement with N., plaintiff paid the amount on receiving from him a guarantee, addressed to E., and also to plaintiffs, as executors of M., to indemnify them and each of them against any action by W.:—Held, that plaintiff might sue alone on this guarantee. (*Place* v. *Delegal*, 4 Bing. N. S. 426; S. C. 6 Scott, 249).

† The party advancing the money, guaranteed to be re-paid by the guarantor, must be correctly described. (*Garrett* v. *Handley*, M. T. 1824, K. B., 3 B. & C. S. C. 5 D. & R. 319; S. C. 1 C. & P. 127). Declaration, stating the guarantee as for a party *now* the plaintiff's traveller, is supported by one in consideration of *continuing* him in plaintiff's employ. (*Ryde* v. *Curtis*, 8 D. & R. 62).

plaintiff, to pay &c. Averment, that plaintiff gave up the guarantee, but defendant did not perform his promise. Plea, that the guarantee was a promise to answer for the debt of another, and that there was no agreement, &c. in writing wherein any sufficient consideration was stated (according to stat. 29 Car. 2, c. 3, s. 4), and that the supposed guarantee was contained in the following written memorandum, signed by defendant:—"Messrs. H., (the plaintiffs), in consideration of your being in advance to L. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. J. B." On demurrer—

The Court held, that the words of the guarantee did not necessarily imply a past advance; and that, if they left it even doubtful whether a future advance was not guaranteed, a promise made in consideration of giving it up was valid.

PAYNE *v.* WILSON, M. T. 1827. K. B. 7 *B. & C.* 423.

PENDING proceedings against A., the defendant gave a memorandum in writing,—"The plaintiff having, at my request, consented to suspend proceedings against A., I do hereby in consideration thereof personally promise to pay, &c., on &c."

The words, "the plaintiff having, at my request, consented to suspend proceedings against A.," may be declared on as executory.

The Court held, 1st, that as the request must have preceded the consent, the agreement might be declared on as an executory contract; and 2nd, that the promise to pay on a given date imported at all events that proceedings were to be suspended until that period; and that after verdict an averment, that the plaintiff did suspend proceedings, was sufficient without specifying for what period.

LILLEY *v.* HEWETT, M. T. 1824. Ex. 11 *Price*, 494.

DECLARATION upon a guarantee, stating that, in consideration plaintiffs (bankers) would not close the account of K., but would continue to make advances, defendant undertook to be answerable for such sums as they had advanced, or should advance to K., to the extent of £——. On demurrer—

A declaration, that, in consideration that the plaintiffs (bankers) would not close an account with A. B., the defendant would pay the sums advanced to A. B., is sufficient.

The Court held, first, that a plea that the promises were to answer for the debt of another, and no agreement or memorandum shewn to have been in writing, or signed by the defendant, or on his behalf, was bad; and secondly, that the declaration need not set out the terms of the agreement, but only so much of the tenor of it as would shew a good cause of action; the solemnities of the Statute of Frauds are only applicable to evidence. The continuing to keep open the account in consideration of the defendant's promise to pay what was then due, and any further advances, was a good consideration; and in assumpsit it is sufficient only to state a good consideration, whether adequate or not.

PAYNE *v.* WILSON, M. T. 1827. K. B. 7 *B. & C.* 423.

THE declaration on a guarantee stated the consideration to be, that the plaintiff "would consent to suspend proceedings against A. until" &c., and alleged that he had suspended proceedings against A. The memorandum produced was the consideration that he had consented to suspend, &c.

A declaration, stating in consideration that plaintiff *would* consent to sus-

pend instead of had consented, not material.

The Court held there was no variance, and that the declaration disclosed a sufficient consideration; and that, after verdict, it was to be taken, that the plaintiff had suspended the proceedings according to the agreement.

HANBURY *v.* ELLA, E. T. 1834. K. B. 3 *N. & M.* 438; S. C. 1 *Ad. & E.* 61.

Under the 3 & 4 Will. 4, the Judge substituted the word "guarantee" for "pay," &c.

THE declaration, in setting out the guarantee, stated that the defendant promised "to pay," &c.

The Court held, that the Judge at Nisi Prius, under the 3 & 4 Will. 4, c. 42, s. 23, might amend the record by substituting "guarantee" for the words "to pay," &c.

(*c*) PLEAS AND REPLICATIONS.

EASTWOOD *v.* KENYON, H. T. 1840. Q. B. 3 *P. & D.* 276; S. C. 11 *Ad. & E.* 438.

No memorandum in writing may be shewn under the plea of non-assumpsit.

DECLARATION in assumpsit on a guarantee. Plea, non assumpsit.

Per Cur.—One point in this case arose on the 4th section of the Statute of Frauds; viz. whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing, we decided in conformity with the case of *Butteman* v. *Hayes*, in the Exchequer, that this defence might be set up under the plea of non assumpsit.

TAYLOR *v.* HILARY, H. T. 1835. Ex. 1 *C., M. & R.* 741; S. C. 3 *D. P. C.* 461; S. C. 5 *Tyrw.* 373.

To an action on a guarantee, the defendant may plead a substituted contract before breach*.

ASSUMPSIT. Declaration on a guarantee given by defendant for the supply of goods to a third party, the defendant pleaded, that, before breach, it was agreed that the goods supplied should be paid for at three months by a joint bill at four months, accepted by defendant, which agreement was accepted in full discharge of the promise and undertaking in the declaration mentioned. On demurrer—

The Court held, that the plea was of a substituted contract, and an answer to an action on the former, and, not being a plea of accord and satisfaction, did not require an averment of performance.

* A plaintiff having given a guarantee for the payment of 1000*l.*, and any other sums which might be advanced to his son by the defendant, a claim in respect of money so advanced on the guarantee is not the subject of a set-off to a declaration for money had and received, and on an account stated. (*Morley* v. *Inglis*, M. T. 1837, C. P., 6 D. P. C. 202; S. C. 4 Bing. N. S. 58; S. C. 5 Scott, 314; abr., post, tit. *Set-Off.*")

On a guarantee under the general issue, the defendant might shew that the consideration alleged in the declaration was not the actual one, without pleading it specially. (*Raikes* v. *Todd*, M. T. 1838, K. B., 1 P. & D. 138; abr., ante, 148).

HEMMING *v.* TREMEY, H. T. 1839. Q. B. 9 *Ad. & E.* 926; S. C. 1 *P. & D.* 661.

If a guarantee be altered, it must be pleaded.

IN assumpsit, the plaintiff declared on a guarantee, which, when produced, was found to have an interlineation, making what otherwise was absolute only conditional.

The Court held, that if proved to have been executed originally without the interlineation, the defendant, if he sought to shew the avoidance of the contract by the alteration, could only do so by pleading it specially.

HOLL *v.* HADLEY, H. T. 1835. K. B. 4 *N. & M.* 515; S. C. 2 *Ad. & E.* 758.

Where a second guarantee merely extends the time of the first, the Statute of Limitations runs from the extended time

A TESTATOR, in 1818, signed a guarantee for goods to be supplied to his son, to the amount of £——; "but upon the express condition, that no application should be made to him but on the failure of your utmost efforts, and legal proceedings to obtain the same from him." The son paid no part of the amount, and after two years quitted England insolvent. No proceedings were taken against him until two years after, when process was issued, and continued on the roll for six years from the date of the guarantee. The guarantor, upon the default of his son in payment, signed another agreement, whereby, in consideration of giving two years' extended time for payment by the son, he agreed to reserve all claim against him under the first guarantee, if, at the expiration of that period, the demand should not have been fully satisfied.

The Court held, that his liability attached upon the expiration of two years; and that the right of action was barred against him by the Statute of Limitations.

WAKEMAN *v.* SUTTON, M. T. 1834. K. B. 4 *N. & M.* 114; S. C. 2 *Ad. & E.* 78.

Replication, that there was a note in writing, need not set it out*.

TO a plea in assumpsit, upon a promise to answer for the debt of another, that there was no memorandum in writing, signed by the defendant, as required by the Statute of Frauds, the replication merely alleged that a memorandum in writing was signed by the defendant. On demurrer—

The Court held, that the replication need not set out the guarantee.

See Lilley v. *Hewitt*, 11 *Price*, 494.

* Where in an action against a surety, upon a guarantee "that P. C. shall faithfully and honestly discharge any duty assigned or trust reposed in him," the declaration, in several counts, stating the guarantee to be for the faithful discharge of his duty as an agent at B., and the sixth count, "for his faithfully discharging any duty," &c., in the words of the guarantee; to which the defendant pleaded, that there was no agreement in writing, wherein the consideration of the special promises, or any of them, was stated; and the plaintiff replied, that notes of each agreement, wherein the consideration for the promises was stated, were in writing, and signed by the defendant:—Held, on demurrer, that the replication was sufficient, in point of form, on which a jury might give a verdict:—Held, also, that the consideration being such as was stated in the sixth count, was sufficient to support the action. (*Lysaght* v. *Walker*, 1 Dow & C. 211).

LOWE *v.* ELDRED, M. T. 1832. Ex. 1 *C. & M.* 239; S. C. 3 *Tyrw.* 234.

In a prior case, in the Exchequer:—Held, a replication to a plea of no agreement in writing must set forth the agreement.

DECLARATION in assumpsit, on a promise to pay the debt of a third person; plea, "no agreement, or any memorandum or note thereof, in writing, signed by the defendant, or any person by him lawfully authorized;" replication, alleging generally that there was an agreement in writing, signed by the defendant, but not setting it out. Demurrer and joinder therein.

The Court held the replication bad, for not setting out the undertaking.

(*d*) EVIDENCE.

HAIGH *v.* BROOKE, T. T. 1839. Q. B. 10 *Ad. & E.* 309; S. C. 3 *P. & D.* 492.

A guarantee may be evidence, though not stamped.

THE declaration stated, as the consideration of an assumpsit, the giving up of a certain guarantee: plea, that the plaintiff did not give up the guarantee.

The Court held, that the guarantee might be given in evidence though unstamped.

(*e*) WITNESSES*.

(*f*) DAMAGES†.

(*g*) COSTS‡.

* Where defendant had given a bill, as a security for a debt from A. B. to the plaintiff:—Held, that A. B. was incompetent as a witness for the defendant. (*Bottomley* v. *Wilson*, N. P. 3 Stark. 148).

If a witness is incompetent, on the ground that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges," is sufficient to render him competent. (*Doe* v. *Allbutt*, 1833, N. P., 6 C. & P. 131. One of several, who have given a guarantee, cannot be a witness for the others. (*Heudebourch* v. *Langley*, 3 C. & P. 571).

† A creditor having proved against the estate of the principal to a larger amount than that covered by the guarantee, the defendant has a right to deduct the dividends from the amount claimed under the guarantee. (*Raikes* v. *Todd*, E. T. 1837, Q. B., 1 P. & D. 138).

‡ In an action against a party on a guarantee for the debt and costs of another, a judge cannot order a stay of proceedings on payment of a certain sum and the costs, being in the nature of an action for unliquidated damages; but the plaintiff is not entitled to the costs incurred after refusal of a sum which he afterwards accepts. (*Fisher* v. *Pyne*, M. T. 1840, C. P., 1 M. & G. 265).

In an action on a guarantee, the plaintiff recovered a verdict, the jury finding it a continuing guarantee, which the Court afterwards confirmed; but the contract not being properly stated, the plaintiff had liberty to amend, and it was agreed that the verdict should stand, but the plaintiff be entitled to deduct therefrom the costs of the trial and of the application:—Held, that the taxation of all the costs up to the notice of trial for the plaintiff, and of all the subsequent costs for the defendant, was proper. (*Allen* v. *Kenning*, H. T. 1833, C. P., 3 M. & Scott, 80).

X. RELATIVE TO THE GUARANTOR'S REMEDY AGAINST HIS PRINCIPAL.

SIMPSON *v.* PENTON, H. T. 1834. Ex. 2 *C. & M.* 430.

If a guarantor's undertaking be original, and not collateral, on paying the money he may maintain an action for money paid against his principal.

IN assumpsit, it appeared that S. introduced P. to an upholsterer, and asked him if he had any objection to supply P. with furniture; and that if he would, he would see him paid; and the upholsterer inquired how long credit he wanted; to which S. replied, he would see it paid at the end of six months; and the upholsterer agreed, and S. ordered the goods, which were delivered according to the directions of P., the upholsterer entering the order in his ledger—"Mr. P. per S.;" and at the end of six months, S., on being applied to by the upholsterer, paid the money.

The Court held, that S. was entitled to recover the amount against P., if the jury were of opinion that the undertaking by S. was not collateral, but that the original credit was given to him. The question, whether an undertaking to be answerable for goods supplied to another is collateral or original, so as to render the party for whose use the goods are supplied liable over in an action for money paid, depends not only on the words used, but upon all the circumstances of the transaction.

Guardian and Ward. See tit. *Infant*.

Habeas Corpus.

See 56 *Geo.* 3, *c.* 100, *s.* 1; and post, tit. *Procedendo*.

I. IN CIVIL CASES.

(*a*) AS TO PERSONS.

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2. *Relative to by whom granted*, p. 166.
3. *Relative to the Rule for, and Affidavits connected with*, p. 166.
4. *Relative to Bail on*, p. 167.
5. *Relative to the Return to, and producing the Party, and of his Discharge*, p. 167.
6. *Relative to setting aside*, p. 168.
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(*b*) RELATIVE TO THE REMOVAL OF CAUSES, p. 168.

II. IN CRIMINAL CASES, p. 169.

I. IN CIVIL CASES.

(*a*) As to persons.

1. *Relative to when it lies.*

PALMER *v.* FORSYTH, T. T. 1825. K. B. 4 *B. & C.* 401; S. C. 6 *D. & R.* 497.

A habeas corpus will not lie unless the party be in actual or constructive custody*.

UPON an attachment of goods in an inferior court, the effect of giving bail appeared to be to release the person, but the bail had no power over the body of the defendant. On motion for a habeas corpus—

The Court held, that, not being in actual or constructive custody, the habeas corpus did not lie.

REX *v.* FOLEY, T. T. 1836. K. B. 5 *Ad. & E.* 441.

A habeas corpus lies to restore children to their guardian†.

ON motion for a habeas corpus, it appeared that the father, by his will, appointed guardians to his children—

The Court made an order for them to be taken from the custody of the grandmother, and delivered to the guardians, notwithstanding a bill filed in equity against the guardians for an account, and for placing the children under the protection of the Court.

WETTON, *In re,* E. T. 1831. Ex. 1 *C. & J.* 459.

So, a habeas corpus lies to remove a defendant from one county in custody on an attachment into another county to take his trial.

ON motion for a habeas corpus, directing the gaoler of his Majesty's gaol of the county of Stafford to have the body of Wetton, a prisoner in the custody of the sheriff of Staffordshire, and against whom a bill of indictment had been found in the county of Middlesex, at the next general sessions of oyer and terminer of our Lord the King, to be holden in and for the county of Middlesex.

Bolland, B., granted the writ.

JONES, *In re,* H. T. 1835. K. B. 2 *Ad. & E.* 436; S. C. 4 *N. & M.* 340.

But will not lie to enable a

ON motion for a writ of habeas corpus to enable a party to vote at an election for a member of Parliament—

* The Court refused the writ to discharge a party under sentence of imprisonment for a seditious libel, who had been tried at the Old Bailey, on the ground that only one commissioner instead of two was present when the jury returned the verdict, but left the party to his writ of error. (*Rex* v. *Carlisle,* 1831, Q. B., 4 C. & P. 415). But where a defendant charged with selling unstamped papers was in custody, the Court granted a habeas corpus for the purpose of enabling him to defend in person. (*Attorney-General* v. *Cleave,* T. T. 1834, Ex., 2 D. P. C. 668).

† Where the father has been convicted of felony, the Court will grant a habeas corpus in order to give the mother the custody of an infant. (*Bailey, Ex parte,* 6 Dowl. P. C. 311; see also 2 & 3 Vict. c. 54). So, where there is a restraint of personal liberty of a feme covert, the Court, in favorem libertatis, will grant a habeas corpus directed to the husband to bring up the body of his wife. (*Cochrane, In re,* T. T. 1840, B. C., 8 D. P. C. 630).

The Court refused the writ, as they thought a party had no right to such a writ merely to enable him to exercise his elective franchise.

party to exercise his elective franchise*.

SCOTT, *Ex parte*, E. T. 1829. K. B. 9 *B. & C.* 446.

A PARTY against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad, and brought here in custody, and committed to prison for want of bail. On motion for a writ of habeas corpus, on the ground that she had been improperly apprehended in the foreign country—

Per Lord Tenterden, C. J.—We cannot interfere. The question is, whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice, or whether we are to consider the circumstances under which she was brought here. I thought, and still continue to think, that we cannot inquire into them. If the act complained of were done against the law of the foreign country, that country might have vindicated its own law. If it gave her a right of action she may sue upon it. I am not, indeed, aware of any cases where the government of a foreign country has interposed, in order that a person might be brought here on a charge of misdemeanor. In cases of felony I know it has been done. I have granted a warrant for the apprehension of the party accused, and I do not know how, for this purpose, to distinguish between one class of crimes and another.

So, the Court will not grant a habeas corpus where a party has been found guilty of perjury, and a warrant issued, and the party apprehended thereon in a foreign country.

ROGERS *v.* JONES, T. T. 1827. K. B. 7 *B. & C.* 86.

IN an action for an escape, the declaration, after setting out the affidavit, plaint, and a precept, alleged that H. S. was detained by means thereof. And H. S. being detained, and remaining a prisoner, at the suit of the plaintiff, for the cause aforesaid, afterwards, to wit, on &c., at &c., was brought before Sir G. S. Holroyd, one of the justices of the King's Bench, by virtue of a writ of habeas corpus, and was thereupon then and there duly committed by Sir G. S. Holroyd to the custody of the Marshal of the Marshalsea, there to remain until &c. By virtue of which commitment, defendant, then and being still Marshal of the Marshalsea, took H. S. into custody, and detained her until afterwards, to wit, on &c., he (the defendant) without the license, &c. voluntarily suffered H. S. to escape.

Per Cur.—In *Melsome* v. *Gardner*, (Cowp. 116), it was decided, after consideration, that a plaintiff, having arrested a debtor by process out of an inferior court, cannot, by habeas corpus ad respondendum, remove him into the custody of this Court to answer to a new action here for the same debt.

So, a plaintiff having arrested a debtor by process of an inferior court, cannot, by habeas corpus ad resp., remove him into the custody of the superior court to answer to a new action there for the same debt†.

* Though, in *Pilgrim, In re*, (5 Ad. & E. 485), a rule nisi was granted for a habeas corpus to bring up a person committed on a charge of embezzlement, as a witness before an election committee of the House of Commons.

† A writ of habeas corpus lies to bring up a plaintiff already in custody, in order to charge him in execution for costs of a nonsuit; and no affidavit is necessary to warrant the issuing of the habeas corpus; nor is it necessary that any day certain for the bringing up of the party should be inserted, or that the number roll of judgment should appear therein.

JONES *v.* DANVERS, E. T. 1839. Ex. 7 *D. P. C.* 394; S. C. 5 *M. & W.* 234.

And the court has no power to grant the writ to charge a party in execution where he is in custody under an order of the Lords of the Admiralty.

THE defendant being in custody by virtue of an order of the Lords of the Admiralty; on motion for a writ of habeas corpus for the purpose of charging him in execution, it was not stated whether or not he was about to be tried by a court-martial.

Per Cur.—We have no power to change the custody. If we did so, we should make the naval gaoler responsible in the event of an escape.

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2. Relative to by whom granted.*

CANADIAN PRISONERS' CASE, H. T. 1839. Ex. 1 *P. & D.* 516; S. C. 5 *M. & W.* 32; S. C. 9 *Ad. & E.* 731.

A Judge at chambers, in vacation, may grant the writ either returnable at chambers or in the full Court; the return may be made without affidavit until impeached.

ON motion for a habeas corpus on behalf of certain persons sent to this country from Canada, and now in the custody of the gaoler of Liverpool, illegally, as was alleged—

The Court said, the writ may be granted by a single Judge in vacation, and returnable immediately, and made returnable before the four Judges, or before the Judge granting it; the return, until impeached, need not be supported by affidavits; and where it is erroneously, but not wilfully, mis-stated in fact, immaterial to justify the prisoner's detention, the Court allowed the return to be amended, and refused an attachment for such false statement.

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3. Relative to the Rule for†, and Affidavits connected with.

PERRIN *v.* WEST, T. T. 1835. K. B. 5 *N. & M.* 251; S. C. 3 *Ad. & E.* 405.

The affidavit may be intituled in the cause.

ON a rule for discharging a prisoner, who was arrested under process from an inferior court, and brought up into this Court by habeas corpus cum causâ—

* The Court of King's Bench, it seems, will not grant a habeas corpus to remove a defendant out of custody, on a writ de contumace capiendo, for the purpose of doing penance before an ecclesiastical court, although the Lord Chancellor will. (*Ex parte Strong*, M. T. 1836, B. C., 5 D. P. C. 213).

And the Judges of the Central Criminal Court have no power, as such, to issue any habeas corpus, or other process, to bring in a party who is in custody of the sheriff of Middlesex on a civil suit, in order that he may be committed to Newgate, to be tried for a misdemeanor before that Court; and the 16th sect. of the 4 & 5 Will. 4, c. 36, does not apply to such a case. (*Rex* v. *Morgan*, 1836, C. C. C., 7 C. & P. 642).

An act which is designated by the Legislature as an "offence," and of which a person convicted is made liable to imprisonment with hard labour, is a criminal matter; and a writ of habeas corpus ad subjiciendum, obtained on behalf of a person under sentence for such offence, must be issued out of the Crown side of the Court. (*In re Eaton*, M. T. 1840, B. C., 9 D. P. C. 207). But if the writ be issued out of the plea side, it is irregular only, and the irregularity may be waived by neglect to object to it in due time.

† The rule for a habeas corpus ad testificandum to bring up a party in custody for felony is only nisi. (*Rex* v. *Pilgrim*, T. T. 1835, B. C., 4 D. P. C. 89).

On application for a habeas corpus, it must appear that the party is detained against his consent. (*Grocot, Ex parte*, H. T. 1825, K. B., 5 D. & R. 610; abr., ante, tit. *Apprentice*, Vol. 1, p. 260).

Per Littledale, J., and *Patterson*, J.—It is no objection that the affidavits on which the rule is obtained are intituled in a cause in this Court.

CANADIAN PRISONERS' CASE, H. T. 1839. Ex. 5 *M. & W.* 53; S. C. 7 *D. P. C.* 208.

There must be an affidavit from the party claiming the writ, or it must be shewn that he is unable to make it.

ON motion for a habeas corpus on behalf of certain persons sent to this country from Canada, and now in the custody of the gaoler of Liverpool, illegally, as was alleged, it was contended, that an affidavit by the prisoner was not requisite since the case of the *Hottentot Venus*, (13 East, 195)—

Sed per Cur.—The party there was supposed to be under coercion. You must either obtain an affidavit from the party, or shew circumstances to the Court from which they may see that it is not procurable.—Refused.

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4. *Relative to Bail on*.*

GILLBANK'S BAIL, M. T. 1828. K. B. 9 *D. & R.* 6.

Where bail on habeas corpus became suddenly ill, time will be given.

ON a writ of habeas corpus, motion was made for time to put in bail, one bail having become suddenly ill.

The Court allowed two days' time to add and justify another bail.

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5. *Relative to the Return to*†, (see also, ante, p. 166), *and producing the Party, and of his Discharge*‡.

BEECHING, *Ex parte*, E. T. 1825. K. B. 4 *B. & C.* 136; (but see post, p. 169, n.)

Smuggling not being a criminal matter within the 31 Car. 2, the prisoner may controvert the return.

UPON the return to a writ of habeas corpus, it appeared that the person making the return had apprehended and detained Beeching and several other persons, under the provisions of the 24 Geo. 3, c. 47 and 45 Geo. 3, c. 121, on a charge of smuggling.

Per. Cur.—We think that the habeas corpus in this case was a writ issuing by virtue of the common law, and not criminal, and we think that, under such circumstances, the 56 Geo. 3, c. 100, s. 4, gives to the prisoners a right to controvert the truth of the return.

* By Rule, H. T. 2 Will. 4, the time allowed for excepting to bail put in upon a habeas corpus, shall be twenty days.

† A return to a habeas corpus, that the party is detained under the warrant of the Speaker of the House of Commons, is sufficient. (*Reg.* v. *Evans*, E. T. 1840, B. C., 8 D. P. C. 451). So, a return shewing that the party was detained in gaol here, on his voyage to a colony to which he had been transported. (*Canadian Prisoners' case*, 5 M. & W. 32; S. C. 7 D. P. C. 208; S. C. 9 Ad. & E. 761).

‡ Where a defendant seeks to be discharged out of custody, on the ground that the warrant of commitment on which he is detained is illegal, he must be brought before the Court by a writ of habeas corpus, although it is sworn that he is too poor to bear the expense, as the validity of the warrant will not be discussed in his absence. (*Martins, Ex parte*, M. T. 1840, B. C., 9 D. P. C. 194). A party brought up on habeas corpus is not in custody on mesne process, so as to be entitled to his discharge upon entering a common appearance, under 1 & 2 Vict. c. 110, s. 7. (*Reynolds* v. *Simmonds*, M. T. 1838, Ex., 7 D. P. C. 85).

6. *Relative to setting aside*.*

7. *Relative to an Attachment on.*

STOCKDALE *v.* HANSARD, E. T. 1840. B. C. 8 *D. P. C.* 474.

An attachment cannot be moved for the day after serving the writ.

ON motion for an attachment for not making a return to the writ of habeas corpus issued from this Court, and commanding the coroner to have the bodies of William Evans, Esq., and John Wheelton, Esq., before the Court, it appeared that the writ had been served on the preceding night.

Per Cur.—There is no sufficient ground at present for the application, we cannot suppose that no return will be made.—Rule refused.

(*b*) RELATIVE TO THE REMOVAL OF CAUSES†.

BOTTINGS *v.* FIRBY, T. T. 1829. K. B. 9 *B. & C.* 762.

A judgment by default in an inferior court removed by habeas corpus does not admit the cause of action‡.

THE action had been originally brought in the Palace Court, and was thence removed (after declaration) by the defendants, by writ of habeas corpus. Upon the removal of the cause, the defendants pleaded in this Court the general issue, but the plaintiff, on the trial, proved a record of a judgment in this action in the Palace Court, by which judgment by default was entered against the defendants. The witness who produced stated that he had drawn it up in consequence of the defendants not having pleaded in time, according to the practice of the Palace Court. Lord *Tenterden* thought the evidence of this judgment was inadmissible. On motion for a new trial—

Per Cur.—We think it was altogether inadmissible. The admission of it would cause great injustice. The action was brought in the Palace Court, and removed thence for the purpose of trying the cause here. It does not appear that the defendants did any act whatever in that Court.

* In May, 1836, the defendant was outlawed, and in the February following obtained judgment as in case of a nonsuit. In March, he obtained a writ of habeas corpus to charge the plaintiff in execution for the costs of that judgment; and a rule to set aside the habeas was moved on the 29th April :—Held, that the outlawry was a sufficient ground for setting aside the writ, and that the application was not too late. (*Aldridge* v. *Buller*, T. T. 1837, Ex., 5 D. P. C. 733).

† It is no objection to a habeas corpus to remove the cause, that the writ has been sued out by an attorney who has not taken out his certificate:—Held, also, that the 21 Jac. 1, c. 23, s. 3, respecting the removal of causes from inferior courts, does not apply to bail who may bring up their principal in order to render him in an action in the Court above. (*Glynn* v. *Hutchinson*, E.T. 1835, Ex., 3 D. P. C. 529). Where a plaint has been entered in the Lord Mayor's Court against two defendants, and one only has been arrested, the cause cannot be removed into the King's Bench without bail being put in for both defendants. (*Jameson* v. *Schonswar*, H. T. 1832, B, C., 1 D. P. C. 175). Where, upon removal of a cause by habeas corpus, the plaintiff declared conditionally before bail perfected, and indorsed a demand of plea:—Held, that it amounted to a waiver of special bail, and that the defendant was right in filing common bail. (*Low* v. *Stevens*, T. T. 1832, K. B., 1 D. P. C. 425).

‡ Where the habeas corpus, to remove from the Palace Court a cause in which judgment was by default, was not delivered until after the damages assessed by a jury, a procedendo awarded. (*Smith* v. *Sterling*, E. T. 1835, B. C., 3 D. P. C. 609).

II. IN CRIMINAL CASES*.

ALLEN, *Ex parte*, H. T. 1834. K. B. 3 *N. & M.* 35.

If justices take bail, and afterwards commit to prison, a habeas corpus will not lie.

ON motion for a habeas corpus, it appeared that A. was charged with a felony before three magistrates, who, upon hearing evidence, admitted him to bail, and afterwards, upon additional evidence, committed him to gaol.

The Court held, that A. was not entitled to a habeas corpus to be discharged out of custody.

Habere facias Possessionem. See tit. *Ejectment*.

Hackney Coaches.

See 1 & 2 Will. 4, c. 32, and 1 & 2 Vict. c. 79.

REX *v.* RAWLINSON, M. T. 1826. K. B. 6 *B. & C.* 23.

Under 12 Geo. 3, c. 69, s. 36, the commissioners have power to appoint stands, and prohibit them, when they would obstruct the public way.

THIS was a question between certain commissioners, under the act 12 Geo. 3, c. 69, "For paving, &c., the South-west District of the Parish of St. Pancras," and certain hackney coachmen, and came before the Court in the form of a rule to shew cause why the defendant (who was a police magistrate) should not proceed to hear and determine certain informations laid before him under the above act, against several hackney coachmen who had disobeyed the order of the commissioners, touching the removal of a stand for hackney coaches in Howland Street. The magistrate was of opinion that the commissioners had no power to make such an order. By stats. 9 Anne, c. 23, s. 16, 1 Geo. 4, c. 57, s. 1, 33 Geo. 2, c. 25, and other acts, authority was given to the hackney coach commissioners, from time to time, to make such orders, bye-laws, and ordinances, as to them, in their discretion, should seem fit; provided the same should be allowed and approved by the Lord Chancellor, the two Lord Chief Justices, and the Chief Baron for the time being.

* Where a defendant, charged with selling unstamped papers, was in custody, the Court granted a habeas corpus for the purpose of enabling him to defend in person. (*Attorney-General* v. *Cleave*, T. T. 1834, Ex., 2 D. P. C. 668). A proceeding under the Smuggling Act (the 4 & 5 Will. 4, c. 13) is a "criminal matter," and therefore a writ of habeas corpus, to bring up a defendant who has been committed under that act, should issue from the Crown side of the Court; but if it is issued from the plea side, the objection only amounts to an irregularity, which is waived if the solicitor of the Customs, appearing before a Judge to oppose the defendant's liberation, does not make the objection previous to an order for the defendant's discharge being made. (*Eaton, In re*, M. T., 1840, K. B., 9 D. P. C. 207). Before the Spring Assizes, 1840, A. was committed to take his trial at those assizes for shooting B. The trial was postponed to the Summer Assizes on the ground of B.'s illness. Before the Summer Assizes B. died, and at those assizes a true bill for the murder of B. was found against A., and his trial was postponed at the instance of the prosecutor to the next Spring Assizes, on account of the illness of a material witness:—Held, that A. was not entitled to his discharge under the 7th section of the Habeas Corpus Act. (*Reg.* v. *Bowen*, 1840, N. P., 9 Car. & P. 509).

The Court granted the application, on the ground that the commissioners have the power.

FROST *v.* WILLIAMS, T. T. 1838. Q. B. 2 *N. & P.* 475; S. C. 7 *Ad. & E.* 773.

The power of the vestrymen of Marylebone, under 35 Geo. 3, c. 72, is not superseded by 1 & 2 Will. 4, c. 22.

IN trespass—

The Court held the power of the vestrymen of Marylebone, under 35 Geo. 3, c. 72, to regulate stands for hackney coaches, is not superseded by 1 & 2 Will. 4, c. 22; and a cabriolet standing for hire near one of the places prohibited by such regulations, held not within the exception in 57 Geo. 3, c. 29, and might therefore be seized by the proper officers.

Handwriting*.

GRIFFITS *v.* IVORY, H. T. 1840. Q. B. 3 *P. & D.* 179.

Where a witness speaks to the defendant's handwriting, another piece of paper, purporting to be the defendant's signature, not connected with the cause, cannot be put into the witness's hand†.

DECLARATION on a bill of exchange. The defence set up as to this bill was, that the acceptance was not in the handwriting of the defendant. Witnesses on both sides having been examined as to their belief on this point, the counsel for the plaintiff proposed, in cross-examination, to put into the hand of a witness for the defendant a written paper, containing the name of the defendant, and to ask him whether he believed that to be the defendant's signature. Being asked by Lord *Denman*, C. J., whether the contents of the paper was material to the issue, he replied in the negative, and that he merely wished to use it in order to test the accuracy of the wit-

* By Rule H. T., 2 Will. 4, it is further ordered, "That the expense of a witness called only to prove the handwriting to, or the execution of any written instrument, stated upon the pleadings, shall not be allowed, unless the adverse party shall, upon summons before a Judge, a reasonable time before the trial, (such summons stating therein the name, description, and place of abode of the intended witness), have neglected or refused to admit such handwriting or execution, or unless the Judge, upon attendance before him, shall indorse upon such summons that he does not think it reasonable to require such admission."

† If a party has received letters from another, and has acted on them, it is sufficient to justify him in swearing as to his belief of the handwriting of such person; (*Tharpe* v. *Gisburne*, E. T. 1825, N. P., 2 C. & P. 21); but where the witness had never seen the party write, nor corresponded with him, but had only seen papers in the Master's office, which were admitted by his attorney to be in his handwriting, and on which the witness had acted:—Held, that it was not a sufficient knowledge to enable him to speak to the handwriting; (*Greaves* v. *Hunter*, 2 C. & P. 477); however, having seen the party sign his surname is sufficient ground for the witness's belief of the party's handwriting. (*Lewis* v. *Sapio*, 1 M. & Malk., N. P., 39, overruling *Powell* v. *Ford*, 2 Stark. N. P. 164). Where other documents were proved to be in the defendant's handwriting, and there being contradictory evidence as to the bill said to be in his handwriting, the Judge directed the jury to take and compare the papers. (*Solita* v. *Yarrow*, 2 M. & Malk., N. P., 133—*Tenterden*, L. C. J.). Semble, it ought to be confined to documents put in evidence for other purposes in the cause. (*Rex* v. *Morgan*, and *Griffith* v. *Williams*, Ib., notes—per *Bolland*, B.) Where the plaintiff used an affidavit signed by a party, and the defendant's attorney swore that he had observed it, and formed an opinion which enabled him to state his opinion as to the signature to an agreement attested by the party:—Held, that it was evidence of handwriting; the plaintiff was precluded from questioning the genuiness of the former signature. (*Smith* v. *Sainsbury*, H. T. 1832, N. P., 5 C. & P. 196).

ness's opinion respecting the defendant's handwriting. The Lord Chief Justice refused to permit this mode of examination.

The Court held, that a witness, on his cross-examination, cannot be asked his opinion as to the genuineness of another document in the handwriting of the supposed writer, such document not being in evidence for other purposes in the cause.

Harbouring Felons. See tits. *Indictment—Principal and Accessories.*

Hares. See tit. *Game.*

Hawkers and Pedlars.

See 1 & 2 Will. 4, c. 22, ss. 75, 76.

ATTORNEY-GENERAL *v.* WOOLHOUSE, T. T. 1827. Ex. 1 *Y. & J.* 463.—S. P. REX *v.* PEASE, H. T. 1830. K. B. 5 *M. & Ry.* 507.

A person conveying goods from his place of abode to another place, for the purpose of sale, and there selling them, is a hawker within the 50 Geo. 3, c. 41.

ON an information for penalties under the 50 Geo. 3, c. 41, it appeared that the defendant, a cabinet maker, residing at Leicester, and having a shop there, sent goods to Ashby-de-la-Zouch in a cart, which he accompanied on foot part of the way, and then went to Ashby-de-la-Zouch by the mail, where he employed an auctioneer and sold the goods by auction.

Per Cur.—It is not necessary that a person should, to come within the provisions of the act, sustain generally the character of a hawker; for it is sufficient if he be a trading person, going from town to town. We think that, the defendant having gone from one town, his usual place of residence, to another, and having there sold his goods by auction, has thereby subjected himself to the penalty.

REX *v.* IVIE M'KNIGHT, E. T. 1840. 10 *B. & C.* 734.

But where a party goes at one time for orders, and at a subsequent period takes the goods ordered, it is not a hawking within the statute.

THE defendant went from town to town soliciting orders for tin, but had not any tin with him on those occasions, obtained orders, and afterwards delivered the tin so ordered. On the question whether this was not an "exposing to sale"—

Per Cur.—Under the 50 Geo. 3, c. 41, we think the sale and delivery are two distinct acts. The defendant goes without the article and takes orders, and then, upon a subsequent occasion, delivers the article which had been so ordered. We think this is not an exposing to sale, or a selling within the meaning of the act.

REX *v.* FARADAY, M. T. 1830. K. B. 1 *B. & Ad.* 275.

The exceptions as to real maker

THE defendant, a partner in a firm of manufacturers, went about from town to town with goods of their manufactory, but in the

or makers of the goods sold is not to be confined to parties actually engaged in the manual labour.

manufacturing of which the parties performed no manual labour, and took with him one of their servants, who sold the goods by auction, (for which he had an auctioneer's license paid for by the firm), the partners giving directions and receiving the money for the lots.

The Court held, that neither was liable to the penalty under the Hawkers' and Pedlars' Act, (50 Geo. 3, c. 41), inasmuch as the partner was the maker of the goods within the exemptions given by the 23rd section, and that, in point of fact, he was the seller of the goods, by reason of his presence and the directions he gave to his servant, the auctioneer.

REX *v.* HODGKINSON, M. T. 1829. K. B. 10 *B. & C.* 74.

The exemption clause in the 50 Geo. 3, c. 41, applies to yeast or barm.

THE defendant was in the habit of purchasing barm or yeast of brewers, and carrying it from town to town for sale. On the question, whether he was liable to penalties under the 50 Geo. 3, c. 41—

Per Cur.—Barm or yeast is an article within the exemption of the 50 Geo. 3, c. 41; and, therefore, defendant is not liable to the penalty.

REX *v.* MAINWARING, M. T. 1829. K. B. 10 *B. & C.* 66.

The words "agents or servants usually residing with such real makers," mean only those servants or agents who do reside*.

A MANUFACTURER sent a quantity of china and earthenware from his manufactory at Hanley to Gainsborough, where he caused it to be sold by auction by a servant in his sole employ, who resided at Hanley in a separate dwelling-house, and with his own family, receiving a fixed yearly salary, and not deriving any profit or loss from such sale.

The Court held, first, that such a servant was not a known agent or servant residing with the maker of the goods, and was, therefore, liable to the penalty for not having taken out a hawker's license; secondly, to protect a party from the penalty for selling goods without a hawker's license, "as the known agent or servant of the real maker thereof," under sect. 23 of stat. 50 Geo. 3, c. 41, such person must be actually resident in the house of the maker.

SIMSON *v.* MOSS, T. T. 1831. K. B. 2 *B. & Ad.* 543.

A hawker's license is no answer to an action for penalties for hawking in a corporate town, contrary to a bye-law.

DEBT by the plaintiff, as chamberlain of the borough of Hertford, to recover penalties of the defendant under a bye-law, made by the corporation, against any person, not being a freeman, selling goods other than victuals, and not at a common fair, nor in the open market. The defendant justified under a license which he had taken out as hawker and pedlar, under the 50 Geo. 3, c. 41.

Per Cur.—The earlier of the hawkers' and pedlars' acts (the 9 & 10 Will. 3, c. 27, s. 15) provided that the license should not authorize any person to go into any corporate town where they could not have gone before. This section was quite unnecessary; for it never could have been intended by these licenses to take away the franchises of all the corporations in the kingdom. The section has been omitted in all the subsequent acts.

* The statute as to licensed hawkers applies to all persons who sell otherwise than at their own residence or place of business. (*Attorney-General* v. *Tongue*, 12 Price, 51; see 12 Price, 58, 65; 1 Y. & J. 463).

Heir.

See also, tit. *Descent*, Vol. III., p. 415*.

BUSHBY *v.* DIXON, T. T. 1824. K. B. 3 *B. & C.* 298; S. C. 5 *D. & R.* 126.

An heir is not estopped by omitting to receive rents from a tenant, under a mistake that the lands passed under a devise.

A WOMAN seised in fee of two adjoining tenements, known by two names, by her will devised her tenements, naming one of them, to her daughter, then married, with a power of making a will. The daughter took possession in 1797 of both the tenements, and in 1807 she died, and the husband afterwards held them as tenant by the curtesy. In 1801, the husband granted a lease for nine years of the premises, and received the rent until his death, in June, 1815. In the meantime the heir-at-law of the testatrix died in 1815, and his son afterwards recovered possession of the tenement not named in the will.

The Court held, that the possession of a tenant for years is the possession of the person entitled to the freehold, and he is not at liberty to say that he took the esplees for another person; for in an action real it is always supposed that the esplees are taken for the owner, as no mention is ever made of a tenant for years. If the heir made an actual entry, he would in law be a trespasser. The wrongful act of the tenant, in paying the rent to another person, cannot make any difference.

BROWN *v.* SHUKER, T. T. 1831. Ex. 1 *C. & J.* 583; S. C. 1 *Tyrw.* 400.

Where to a plea of riens per descent, the plaintiff replies lands descended, the jury must inquire the value of the lands descended.

IN debt on bond, given to the plaintiff by Edward Edwards, deceased, of whom the defendants, the three wives of the other defendants, were the co-heiresses. Pleas (inter alia), riens per descent at the time of exhibiting the bill, or at any time before or since. Replication, that defendants, after the death of Edwards, and before the commencement of the suit, had lands in fee simple by descent from Edwards, with a verification. Issue thereon. The jury having found for the plaintiff without inquiring of the value of the land descended—

The Court were clearly of opinion that, by the pleadings, this case was within the stat. of 3 & 4 W. & M. c. 14, ss. 5, 6,—the latter of which sections enacts, "that the heir may plead riens per descent at the time of the original writ brought, or the bill filed against him, and that the plaintiff may reply that the defendant had lands from his ancestor before the original writ or bill filed; and if, upon issue joined thereon, it be found for the plaintiff, the jury shall inquire of the value of the lands so descended,"—and consequently that the jury who tried the cause should have inquired of the value of the lands. They not having done so, their verdict was imperfect, and a venire de novo must be awarded.

Heriot. See tit. *Copyhold.*

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* Where stat. 3 & 4 Will. 4, c. 106, is abridged.

Highway*.

See, also, tit. *Turnpike and Turnpike Roads.*

I. RELATIVE TO THE OWNERSHIP IN THE SOIL AND ADJOINING LANDS BEFORE THE 5 & 6 WILL. 4, c. 50, p. 178.

II. RELATIVE TO THE DEDICATION BEFORE THE 5 & 6 WILL. 4, p. 179.

III. RELATIVE TO THE REPAIRS.

(*a*) BEFORE THE 5 & 6 WILL. 4, p. 179.

(*b*) SINCE THE 5 & 6 WILL. 4, p. 179.

* The 5 & 6 Will. 4, c. 50, consolidates and amends the laws relating to highways.

By section—1. Repeal of 6 Geo. 1, c. 6, in part, except as to London; 18 Geo. 2, c. 33, except as to London; 24 Geo. 2, c. 43, in part, except as to London; 30 Geo. 2, c. 22, except as to London; 13 Geo. 3, c. 78; 34 Geo. 3, c. 64; 34 Geo. 3, c. 74; part of 42 Geo. 3, c. 90; 44 Geo. 3, c. 52; 54 Geo. 3, c. 109; and 55 Geo. 3, c. 68.

Sect. 2. Not to revive repealed acts.

Sect. 3. As to the recovery of penalties incurred for offences against acts repealed.

Sect. 4. Present surveyor to continue until a surveyor is appointed.

Sect. 5. Interpretation clause.

Sect. 6. Surveyor to be elected annually. May be re-elected.

Sect. 7. Qualification of surveyor.

Sect. 8. Penalty on surveyor not acting when chosen.

Sect. 9. Surveyor may be appointed with a salary.

Sect. 10. Surveyor, on verifying his accounts, to name his successor.

Sect. 11. Power to justices in certain cases to appoint a surveyor.

Sect. 12. When parish is situate in more than one county.

Sect. 13. Parishes may direct application to be made to justices at sessions for forming them into districts.

Sect. 14. Justices at sessions may unite such parishes into districts, and select and appoint a district surveyor.

Sect. 15. Names of parishes and of district surveyor to be recorded, and a copy thereof sent to each churchwarden, &c. Parishes when united to form a district for three years, and until twelve months after any one parish shall give notice of intention to cease to form one of said district.

Sect. 16. District surveyor to have power of surveyor, except in levying rate. Salary of district surveyor, how to be paid.

Sect. 17. When parishes are united, a surveyor to be appointed to make rate, &c.

Sect. 18. Appointment of a Board directing repairs in large parishes. Powers of the Board.

Sect. 19. Board may hire or purchase premises.

Sect. 20. Penalty on surveyor, &c., for neglect of duty.

Sect. 21. As to repair of highways and adjoining bridges hereafter to be built, raised causeways, &c.

Sect. 22. Powers for getting materials and preventing nuisances to extend to county bridges and roads at the ends thereof.

Sect. 23. When new highways are to be kept in repair by parishes. Proviso.

Sect. 24. Direction-posts, where and how to be erected.

Sect. 25. Power to use adjoining ground as a temporary road.

Sect. 26. Surveyor to remove snow, &c.

Sect. 27. Surveyor to make rate. Rate to be allowed by justices.

Sect. 28. Surveyor may inspect rate-book, and obtain copies or extracts.

Sect. 29. Form and amount of rate.

Sect. 30. Surveyor to have power to enforce composition in certain parishes.

Sect. 31. Errors in rates may be rectified.

Sect. 32. Persons may be excused by justices from payment of highway-rate.

Sect. 33. Certain persons not liable to payment of highway-rate.

IV. RELATIVE TO THE SURVEYORS AND THEIR ACCOUNTS BEFORE THE 5 & 6 Will. 4, p. 181.

V. RELATIVE TO THE RATE OR ASSESSMENT.

(*a*) Before the 5 & 6 Will. 4, p. 183.

(*b*) Since the 5 & 6 Will. 4, p. 185.

VI. RELATIVE TO DIVERTING, CHANGING AND STOPING UP, BEFORE THE 5 & 6 Will. 4, p. 186.

VII. RELATIVE TO APPEALS CONNECTED WITH, BEFORE THE 5 & 6 Will. 4, p. 189.

Sect. 34. Rates, how to be recovered.

Sect. 35. Rate-payers may divide among themselves the conveyance of stone &c. for repair of highways, which shall be paid for by the surveyor.

Sect. 36. Surveyor, with consent of vestry, may appoint collector of rates.

Sect. 37. Security to be taken from collector.

Sect. 38. Collector to make out accounts of all monies received under this act, &c.

Sect. 39. Separate accounts to be kept.

Sect. 40. Surveyor to keep books and account of monies received, &c., to be open to inspection of rated inhabitants.

Sect. 41. The property in all books, &c., to be vested in surveyor for the time being.

Sect. 42. Surveyor on quitting office to deliver books, &c., to succeeding surveyor. Penalty for neglect.

Sect. 43. In case of death of surveyor executors to account.

Sect. 44. Yearly accounts to be made by surveyors, &c., and laid before the justices at a special sessions for the highways. Subject to appeal. Surveyors appointed under the act of 13 Geo. 3, to pass their accounts at special sessions after 25th March, 1834.

Sect. 45. Justices to hold special sessions for purposes of this act. At such sessions surveyor to verify accounts and make returns of the state of the roads, &c.

Sect. 46. Surveyor may contract for getting and carrying materials, but not to share in any contract, or let to hire any team, or dispose of any timber, stones, &c. without license from two justices. Penalty.

Sect. 47. Penalty on taking away materials belonging to surveyor.

Sect. 48. Land allotted to the parish for materials, when exhausted, may be sold.

Sect. 49. Tenant for life, &c. may renounce damages.

Sect. 50. Persons enfeoffed with lands for maintenance of highways, &c. shall let them to farm at the most improved value, with consent of justices.

Sect. 51. Materials, where and in what manner to be taken by surveyors. Power to gather stones without making satisfaction, but satisfaction to be made for damages to be done by carrying them away.

Sect. 52. Not to extend to sea-beach, &c.

Sect. 53. Notice to be given before materials are taken from private lands. If the occupier shew cause against the removal, two justices shall decide thereon.

Sect. 54. If sufficient materials cannot be found in waste lands, &c., surveyor may take them from the several or inclosed lands or grounds, making satisfaction to the owners.

Sect. 55. If surveyor shall make pits or holes in getting materials, he shall cause them to be filled up or stopped down and fenced off, and in like manner all those already made. Penalties on surveyor for neglect herein.

Sect. 56. Penalty on surveyor allowing any heap of stone to remain on the highway at night.

Sect. 57. Surveyor damaging mills, dams, &c., by digging materials, to forfeit not exceeding 5*l.*

Sect. 58. Where a highway lies in two parishes, the justices to determine what parts shall be repaired by each. Proviso in case of highway repaired by party ratione tenuræ, &c.

Sect. 59. Parishes, &c., bound to repair the part so allotted.

Sect. 60. How costs of proceedings shall be defrayed, &c.

Sect. 61. Boundary of counties, &c., shall not be changed, except for the purpose aforesaid.

VIII. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) Before the 5 & 6 Will. 4, p. 190.

(*b*) Since the 5 & 6 Will. 4, p. 190.

IX. RELATIVE TO INDICTMENTS, BEFORE THE 5 & 6 Will. 4, p. 191.

X. RELATIVE TO PRESENTMENTS, BEFORE THE 5 & 6 Will. 4, p. 192.

XI. RELATIVE TO EVIDENCE, BEFORE 5 & 6 Will. 4, p. 192.

Sect. 62. Highway repaired by party, ratione tenuræ, may be made a parish highway.

Sect. 63. What shall be deemed the centre of the highway.

Sect. 64. No trees, &c., allowed to be planted within fifteen feet of the centre of the carriage way.

Sect. 65. Mode of proceeding if highway is prejudiced by hedges, &c.

Sect. 66. Time of cutting hedges and trees.

Sect. 67. Surveyor to make and keep open ditches, &c., and to lay trunks, &c., through lands adjoining highway, paying for damage, if any, incurred.

Sect. 68. Owner, occupier, &c., not to alter such ditches without consent.

Sect. 69. Penalty for encroaching on highway. Encroachment to be taken down by surveyor.

Sect. 70. Steam-engines, &c., not to be erected within a certain distance of roads.

Sect. 71. Proprietors of railways to erect gates, &c., where they cross highways.

Sect. 72. Penalty on persons committing nuisances, by riding on footpaths, &c., by injuring the road, by damaging banks, causeways, direction-posts, milestones, &c., by making fires, by baiting bulls, by laying timber, &c., by running of filth.

Sect. 73. Matters laid on or near highways, so as to be a nuisance, to be removed on notice; or, on failure, surveyor to dispose of the same by order of a justice.

Sect. 74. Surveyor to impound cattle found straying on highways, until the penalty herein imposed, and the charges, are paid. Limiting the extent of penalty. Right of pasturage not taken away.

Sect. 75. Punishing persons guilty of pound breach.

Sect. 76. Names of owners to be painted on all waggons, &c., in the manner herein mentioned.

Sect. 77. One driver may take charge of two carts, provided they are drawn only by one horse each.

Sect. 78. Drivers of waggons or carts not to ride thereon, unless some other person guide them. Drivers causing hurt or damage to others, or quitting the road, or driving carriage without owner's name, or not keeping the left or near side, or interrupting free passage, if not the owner, to forfeit 20*s.*; if he be the owner, 40*s.* Proceeding if driver will not discover his name.

Sect. 79. For securing unknown offenders.

Sect. 80. Cart-ways to be twenty feet wide, horse-ways eight feet, and footways three feet.

Sect. 81. Width of gates across public cart-ways and horse-ways.

Sect. 82. Justices may order narrow highways to be widened. Surveyor to agree with owners of land for recompense; and if they cannot agree, the same may be assessed by a jury at the quarter sessions. On payment of money assessed, ground to be deemed a public highway. Where there is not money sufficient, a further rate may be made by order of the justices at their quarter sessions, not exceeding one-third of rate.

Sect. 83. Costs of proceedings, by whom payable.

Sect. 84. Previous to a highway being stopped up, &c., surveyor to request justices to view the same.

Sect. 85. Proceedings for diverting, &c., certain highways, and stopping up unnecessary highways.

Sect. 86. As to stopping up more than one highway connected together.

Sect. 87. Court may confirm order for so doing wholly or in part.

XII. RELATIVE TO WITNESSES.

(*a*) Before the 5 & 6 Will. 4, p. 193.

(*b*) Since the 5 & 6 Will. 4, p. 193.

Sect. 88. Persons who may think themselves aggrieved, if such highway should be ordered to be stopped up, &c., may appeal.

Sect. 89. In case of appeal, jury at sessions to determine whether new highway is nearer &c.

Sect. 90. Costs to be awarded on appeal against stopping highway.

Sect. 91. If no appeal be made, or if dismissed, sessions to make order for diverting, &c., and the old ways may be stopped. New highway shall afterwards continue a public highway, &c.

Sect. 92. Party liable to repair of old highways to repair new highways.

Sect. 93. Provisions as to widening of a highway to extend to all highways, which persons are bound to repair ratione tenuræ, &c. Justices to fix annual or other amount payable by party previously bound to repair.

Sect. 94. Mode of proceeding before justices, if highway is out of repair. In what cases justices cannot interfere.

Sect. 95. Mode of proceeding if obligation to repair is disputed.

Sect. 96. Fines, penalties, how to be levied and applied.

Sect. 97. Justices empowered to award costs to defendant, where information, &c., is drawn or dismissed.

Sect. 98. Court may award costs to the prosecutor.

Sect. 99. No presentment against inhabitants for highway being out of repair.

Sect. 100. Inhabitants and officers in parishes may give evidence.

Sect. 101. Justices may proceed by summons in the recovery of penalties.

Sect. 102. Compelling witnesses to attend and give evidence.

Sect. 103. Forfeitures, costs, and charges, may be levied by distress and sale. Application of penalties.

Sect. 104. Satisfaction recoverable for special damage; but distress not to be deemed unlawful for want of form in the proceedings.

Sect. 105. Appeal may be made to quarter sessions against rate, &c.

Sect. 106. Provisions of 41 Geo. 3, c. 23, applicable to this act.

Sect. 107. Rates and proceedings not to be quashed for want of form.

Sect. 108. In case of appeal, sessions may grant a special case.

Sect. 109. Limitation of actions. Defendant may plead the general issue. Costs.

Sect. 110. Amount of fees.

Sect. 111. Expenses for defending prosecutions agreed upon at a vestry meeting, how to be paid.

Sect. 112. Limiting powers of 37 Geo. 3, c. 29.

Sect. 113. Not to extend to turnpike-roads, or to roads under local acts.

Sect. 114. Not to affect the Universities.

Sect. 115. Nor the rights and liberties of the city of London.

Sect. 116. Nor the act of 1 Geo. 4, c. 7.

Sect. 117. Powers of commissioners of sewers not abridged.

Sect. 118. Concerning the forms of proceedings.

Sect. 119. Commencement of act.

Sect. 120. Act may be altered this session.

The 2 & 3 Vict. c. 45, amends the 5 & 6 Will. 4, c. 50. By section 1. "That whenever a railroad crosses or shall hereafter cross any turnpike-road, or any highway or statute-labour road, for carts or carriages, in Great Britain, the proprietors or directors of the company of proprietors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road as aforesaid, at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad; and any complaint for any neglect in respect of the said gates shall be made, within one calendar month after the said neglect, to any justice of the peace, or, if in Scotland, to the sheriff of the county, who may summon the party so complained against to appear before them or him at the next petty session or court to be holden for the district or division within which such gates are situate, who shall hear and decide upon the said complaint; and the proprietor or director so offending shall for each and every day of such neglect forfeit any sum not exceeding £5, together with such costs as to the justices or sheriff depute aforesaid, before whom the conviction shall take place, shall seem fit."

XIII. RELATIVE TO JUDGMENTS CONNECTED WITH, SINCE 5 & 6 Will. 4, p. 193.

XIV. RELATIVE TO THE COSTS.

(*a*) Before the 5 & 6 Will. 4, p. 194.

(*b*) Since the 5 & 6 Will. 4, p. 194.

XV. RELATIVE TO THE CERTIORARI, BEFORE THE 5 & 6 Will. 4, p. 195.

XVI. RELATIVE TO THE NEW TRIAL, BEFORE THE 5 & 6 Will. 4, p. 196.

I. RELATIVE TO THE OWNERSHIP IN THE SOIL* AND ADJOINING LANDS, BEFORE 5 & 6 Will. 4, c. 50.

Doe *d.* Pring *v.* Fearsey, T. T. 1827. K. B. 7 *B. & C.* 304.

The rule as to waste land on either side of a highway applies to copyhold as well as freehold.

In ejectment, it appeared that, in the year 1804, the defendant's father had built a cottage upon, and inclosed the land in question, which was a slip of waste land, lying between a close (of which one of the lessors of the plaintiff was the copyhold tenant, and the other the occupier) and the high road.

The Court held, the presumption of law, that waste land on the side of the highway is the property of the owner of the adjoining soil, is applicable to copyholders as well as freeholders; and is good primâ facie evidence of the title of such owner in an action of ejectment for the recovery of that land.

Doe *d.* Barrett *v.* Kemp, H. T. 1831. C. P. 7 *Bing.* 332; S. C. 5 *M. & P.* 173.

On a question whether a slip of land between an old inclosure and the highway, belonged to the lord:—Held, that acts of ownership by him in other places within the manor were evidence*.

The plaintiff claimed a right to a slip of land, lying between the highway and the land of a stranger. The defendant claimed it as lord of the manor, and proved acts of ownership over similar slips adjoining his own land, and then proposed to give evidence of the exercise of like acts of ownership over other slips of waste in other parts of the manor adjacent to the inclosures of other persons. This evidence was rejected by *Littledale*, J. On motion for a new trial—

Per Cur.—In questions as to rights of common, evidence of feeding upon one part of the common is evidence of a right over the whole. Inclosing the land is certainly a much stronger exercise of ownership than feeding; and, therefore, the lord may shew that he has inclosed other slips of waste similarly situated, parts of the same manor. If such evidence were not to be admitted, though the lord were prepared to shew that he had inclosed every other waste spot of the manor, yet he might lose his right to the slip of land in question thereby, because he was not prepared to prove the exercise

* The ownership in the soil vests in the owner, (*Lade* v. *Shepherd*, H. T. 1736, K. B., 2 Stra. 1004), for which he may maintain ejectment. (*Goodtitle* v. *Alker*, T. T. 1757, K. B., 1 Burr. 133; S. P. *Doe* d. *Jackson* v. *Wilkinson*, 3 B. & C. 413).

of his right upon the precise spot. We think such evidence was admissible, and fit for the consideration of the jury.

II. RELATIVE TO THE DEDICATION, BEFORE 5 & 6 WILL. 4.

REX *v.* LEAKE, M. T. 1833. K. B. 2 *N. & M.* 583; S. C. 5 *B. & Ad.* 469.

The commissioners under a drainage act are competent to dedicate to the public*.

COMMISSIONERS under a drainage act were authorized to dig, &c. place the mud, &c. on banks:—Held, that they were competent to dedicate such banks to the public, so as to acquire rights thereon, as public ways, (per *Denman*, L. C. J., and *Park*, J., contra *Littledale*, J.); and, where a road has been so dedicated, and the way, by user of the public, become a highway, acquiescence in such dedication or user by the parish is unnecessary, as affecting their liability to repair.

III. RELATIVE TO THE REPAIRS.

(*a*) BEFORE 5 & 6 WILL. 4.

REX *v.* WRIGHT, E. T. 1832. K. B. 3 *B. & Ad.* 681.

Commissioners under an inclosure act, with power to set out private roads, and to direct their repair, cannot direct the township to repair them†.

THE road in question had been set out about the year 1770, by commissioners under an act passed in the 8th year of Geo. 3, "for dividing and inclosing several commons and waste grounds within the manors of Navertru, in the parish of Childwall, in the county palatine of Lancaster." The commissioners, by this act, were empowered to set out public and private roads, with power to direct the repairs of the former. It was contended, that the case of *The King* v. *Richards and others*, (8 Term Rep. 634), is in point. There a similar mistake had been made by commissioners of an inclosure act as to their powers; but it was held, that no indictment would lie against the inhabitants for not repairing the road, it not being a public road.

But the Court gave no opinion on the point.

* In this case a road had been used by the public without interruption for about thirty years, but it appeared that in 1814, twenty-two years before the action commenced, an agreement was made by the owner of the soil on one side, and a company, and the surveyor of highways of the hamlet, and others, on the other side, by which the owner agreed to let them use the road, on the company paying 5*s.* a-year, and finding cinders, and the hamlet loading and spreading them:—Held, that, although the evidence of user per se would shew a dedication by the owner of the soil, it was explained by the agreement of 1814, and that the agreement only amounted to a license to use during such time as the conditions in it should be observed. (*Baraclough* v. *Johnson*, 3 Nev. & Per. 233; S. C. 8 Ad. & E. 99.)

† Upon an issue of liability to repair ratione tenuræ of an ancient mill, which was shewn not to exist before the time of Hen. 8:—Held, that it could not be supported; it is essential to prove the liability from time out of memory. (*Rex* v. *Hayman*, 1829, N. P., 1 M. & M. 401).

On an indictment against the parish for non-repair of a highway within it, alleging the liability of the parish at large; plea, alleging that a township had always been accustomed and of right ought to repair, traversing the liability of the parish at large to repair; and issue on the custom found for the defendants:—Held, first, that the custom being in favour of the defendant, judgment for the Crown could not be entered non obstante veredicto; and secondly, that the plea was bad for not averring in direct terms that the parish would have been liable but for the custom,—and judgment arrested. (*Rex* v. *Hatfield*, 4 Ad. & E. 156; abridged post, p. 180).

REX *v.* CUMBERWORTH, INHABITANTS OF, M. T. 1836. K. B. 4 *Ad. & E.* 731; S. C. 1 *N. & P.* 197.

Where, under a local act, roads are to be made, the parish is not bound to repair until they are complete,

ON an indictment for non-repair of a road, it appeared that trustees were authorized, under a local act of Parliament, to make a line of road, consisting of a main line and several branches.

The Court held, that where, under a local statute, roads are to be made, the parish is not bound to repair until they are finally completed.

REX *v.* HATFIELD, H. T. 1835. K. B. 4 *Ad. & E.* 156.

and declared to be repaired by the sessions.

AN inclosure act directed that allotments to be made in respect of certain messuages should be deemed parcel of the townships in which messuages were situated; and the commissioners were directed to set out roads, and to declare in what parish or township such roads were situate, and by whom to be repaired. One of the roads directed by them passed between allotments which were declared to be in different townships, but the road, which was an ancient one, had, previous to the inclosure, been in one township, and the award omitted to declare in what township the allotments were situate, or by whom the road was to be repaired.

The Court held, that the act did not, by changing the parochial locality as to such allotments, affect that of the road which, in the absence of any declaration by the commissioners, was to be still deemed in the original township:—Held, also, that to subject the inhabitants of the district to repair an old continued road, as well as roads newly set out and made, it must be first declared, by justices in sessions, to be fully completed and to be repaired.

(*b*) SINCE THE 5 & 6 WILL. 4.

REG. *v.* BARTON, H. T. 1840. Q. B. 3 *P. & D.* 190.

The words, bodies and persons, in the 4 Geo. 4, c. 95, apply to parishes*.

BY sect. 68 of 4 Geo. 4, c. 95, after reciting that doubts had arisen whether any body politic or corporate, or any particular person or persons, are liable to repair, by tenure or otherwise, any old turnpike road, or part of such road, widened, altered, diverted, or turned, or ought to repair, or contribute to the repair of the whole, or any part or proportion of the new road set out in lieu of the old turnpike road, it was enacted, "That all and every body politic or corporate, and person and persons," who was, were, or should be liable, &c. to the repair of any old turnpike road, &c. should respectively be and continue liable to the repair of such new road set out in lieu of the old &c. In an indictment against a parish for non-repair of a new piece of road—

The Court held, that the inhabitants of a parish were included in the above words.

* Where an information is laid under 5 & 6 Will. 4, c. 50, s. 94, that a highway is out of repair, and the magistrates, pursuant to that section, appoint a viewer, who reports it out of repair, the magistrates, at the special sessions, are not bound by that report, but may exercise their discretion whether they will convict the surveyor or not. (*Reg.* v. *Wilts, Justices of*, T. T. 1840, B. C., 8 D. P. C. 717).

IV. RELATIVE TO THE SURVEYORS AND THEIR ACCOUNTS, BEFORE 5 & 6 WILL. 4.

REX *v.* KING'S NEWTON, H. T. 1831. K. B. 1 *B. & Ad.* 826.

Where a parish consists of two distinct townships, and a surveyor appointed for each, separate rate is not illegal.

A PARISH consisted of two townships, for each of which, as long as living witnesses could prove, there had been separate surveyors of highways, separate rates for the repairs, and separate accounts, at the examination of which both sets of the inhabitants attended, but on such occasions there had been but two surveyors for the parish at large, in order to save expense.

Per Cur.—There were distinct rates applied distinctly—distinct accounts, though both sets of inhabitants attended at the examination of them. There is not enough to break in upon the fact, that the custom immemorially has been to appoint separately, except when done otherwise for the purpose of saving expense. We therefore think the rate is not illegal.

LOWEN *v.* KAYE, E. T. 1825. K. B. 4 *B. & C.* 3.

Under 13 Geo. 3, c. 78, s. 64, the surveyor has no power to remove a fence not on the highway*.

TRESPASS, for breaking and entering plaintiff's close, and taking up his posts and rails, and fences, erected thereon. It appeared that the alleged trespasses had been committed by the defendant, under colour of his authority as surveyor of the highways, in order to widen a road on which the plaintiff was supposed to have encroached, by erecting the fence in question. The locus in quo was waste of a manor in 1773, had been inclosed upwards of fifty years, and formed the frontage of plaintiff's house and lands to the road. The latter was proved to be less than thirty feet wide at the locus in quo. To shew that the spot in question had some time or other formed part of the highway, it was proved that, on taking up the posts belonging to this fence, the workmen came to hard gravel at about a spade's depth from the surface.

Per Cur.—The fact, that a highway is not thirty feet wide at the place where a fence stands, will not of itself enable a surveyor to take it down under 13 Geo. 3, c. 78, s. 64, unless it be placed on a spot which was part of the existing highway at the time it was placed there.

WITHAN NAVIGATION PROPRIETORS *v.* PODLEY, M. T. 1832. K. B. 4 *B. & Ad.* 69.

So, surveyors cannot remove an obstruction to a highway, fixed to the freehold;

BY 13 Geo. 3, c. 78, s. 10, it is enacted, "That, if any stone or timber, &c., shall be laid in the highway, and the party placing it there shall not remove it within a certain time after notice, the owner of lands adjacent may." By sect. 12, the surveyors of the highway may remove nuisances, encroachments, obstructions, or annoyances made or committed contrary to the directions of the act. By the 82nd section, in actions brought against parties for anything done in pursuance of the act, they may plead the general issue, and

* An engineer, making estimates for a public road, is not to act on information as to the nature of the soil, but it is his duty to examine it himself. (*Moneypenny v. Hartland*, T. T. 1826, N. P., 2 C. & P. 378).

give the act and special matter in evidence. The defendants erected a watch-box, or house of timber, upon the highway.

The Court held, that there were no words in the act which enabled the surveyors to remove such a building, as being against the directions of the act. Therefore, that they could not, on an action of trespass being brought against them, justify the removal under the general issue, but should have proved the special matter.

ALSTON *v.* SCALES, T. T. 1832. C. P. 9 *Bing.* 3; S. C. 2 *M. & Scott*, 5.

and where a surveyor of highways, to effect an improvement, directed part of the plaintiff's bank to be removed:—Held, that the plaintiff, as reversioner, might sue for the injury.

BY the 13 Geo. 3, c. 78, s. 15, it is enacted, "That the surveyors of the highways shall, and they are hereby required to make, support, and maintain, or cause to be made, supported, and maintained, every public cart-way, leading to any market-town, twenty feet wide at the least, and every public horse-way or drift-way eight feet wide at the least, if the ground between the fences will admit thereof." And under the supposed authority of this act, the defendant, a surveyor of the highways at Old Ford, in Essex, had paved the sides, and taken away part of the land of an uneven bank, which belonged to the plaintiffs, who were trustees of Cockburn's charity there:—Held, that the surveyor of the highways was liable for removing the bank, it being a permanent injury to the land, although it might be an improvement at the time.

See 5 *B. & Ad.* 508.

WARD *v.* BATEMAN, M. T. 1832. Ex. 1 *C. & M.* 185; S. C. 3 *Tyrw.* 221; S. C. 1 *D. P. C.* 620.

Under 13 Geo. 3, c. 78, s. 81, treble costs are not payable on a verdict obtained by the surveyor.

CASE for an injury to the plaintiff's reversionary interest. Pleas, 1st, the general issue; 2nd, that the acts were done by the defendant in the execution of his office as surveyor of the highways, and a tender of 5*l.* as amends. Verdict for the defendant. On taxation of costs, the Master having allowed the defendant only single costs, a rule had been obtained to shew cause why the Master should not review his taxation, on the ground that, pursuant to stat. 13 Geo. 3, c. 78, s. 81, the defendant was entitled to treble costs.

The Court held, that the Highway Act (13 Geo. 3, c. 78, s. 81) does not entitle a surveyor of highways to treble costs after verdict, but only in cases of nonsuit, discontinuance, or judgment on demurrer.

REX *v.* FOWLER, T. T. 1831. K. B. 3 *N. & M.* 826; S. C. 1 *Ad. & E.* 836.

Whatever expenses are incurred by the surveyors are subject to investigation by the justices in passing the accounts.

ON a certiorari to remove an order of justices, with respect to passing surveyor's accounts, under the 13 Geo. 3, c. 78—

The Court said, by the 48th section the surveyor is to keep a book, in which he is to enter an account of all such money as shall have come to his hands by virtue and for the purposes of the act, and to whom and on what occasion he shall have paid or applied the same; he is therefore to keep an account of his disbursements and expenditure. All expenses bonâ fide incurred by the surveyors in the execution of the duty imposed upon them by the statute are matters on which the justices may exercise their discretion. Law expenses, incurred in resisting a rule for a certiorari to remove the

allowance, by a justice, of the accounts of preceding way-wardens, are expenses which a way-warden may insert in his account, and which the justices may allow, if they think proper.

REX *v.* JUSTICES OF CUMBERLAND, M. T. 1835. K. B. 5 *N. & M.* 578.

A special sessions have no jurisdiction to allow the accounts of the surveyors or way-wardens.

ON the return to a certiorari, to remove an order made at a special sessions, allowing certain accounts of surveyors of highways, a rule having been obtained for quashing the order, it appeared that at a vestry meeting, held on the 6th October, it was resolved that the accounts should be laid before the sessions, and this course was adopted with the entire concurrence of all parties.

Per Cur.—How can the special sessions have a jurisdiction which the act of Parliament says they shall not have? We are not aware of any case which goes the length of deciding that the consent of parties will give the sessions that jurisdiction.

REX *v.* JUSTICES OF SOMERSET, T. T. 1826. K. B. 5 *B. & C.* 816; S. C. 6 *D. & R.* 469.

And the petty sessions have no right to allow accounts until after the examination by the justices.

ON motion for a certiorari, it appeared that justices at a petty sessions made an order for allowance of the accounts of a surveyor before any previous examination of them by a justice, according to sect. 48 of the 13 Geo. 3, c. 78:—Held, that, having acted without any jurisdiction, the order was not a proceeding in pursuance of the act, and consequently that the sect. 80, taking away the certiorari, did not apply to the case.

HEUDEBOURCK *v.* LANGTON, H. T. 1830. K. B. 10 *B. & C.* 546.

The special sessions have no original jurisdiction to examine and settle the surveyor's accounts, but merely to examine such items as the single justice shall disallow.

THIS was an action against the defendant, late surveyor of the highways. The defendant, in October, 1828, went out of office, and gave in his accounts, by which a balance of £169 appeared to be due from him. The accounts were taken before a justice, who refused to examine them, and referred them to the special sessions, where they were examined, and the sum of £60 disallowed, so that the balance due from the defendant appeared to be £229. It was objected, on the part of the defendant, that the justices at special sessions had not any original jurisdiction to examine and settle the surveyor's accounts, but merely to examine such items of the accounts as the single justice, upon an examination of them, did not think fit to allow. Lord *Tenterden* was of that opinion, and directed a nonsuit.

And the Court refused to interfere.

V. RELATIVE TO THE RATE OR ASSESSMENT.

(*a*) BEFORE 5 & 6 WILL. 4.

REX *v.* LACY, T. T. 1826. K. B. 5 *B. & C.* 702; S. C. 8 *D. & R.* 457.

The word "tithes," in

THE following case was sent for the opinion of the Court:—"Lacy is the rector of the parish of Whiston. In 1816 an act was passed

13 Geo. 3, c. 78, extends to that which is equivalent to tithe.

for inclosing lands in that parish, by which commissioners were authorized, among others, to fix upon 'a clear annual rent, or sum of money, per annum,' in lieu of the great tithes and moduses payable to him and his successors, in respect of so much of the parish as lay within the manor of Whiston. The rents were fixed upon accordingly, and Mr. Lacy has since received them. He has been assessed, in respect of those rents, at the sum of 12*l.* 5*s.*, under a rate duly made for the repairs of the highways; and the question is, whether he is liable to be assessed in respect thereof."

The Court held, that a rent given by act of Parliament, in lieu of tithe, is liable to contribution to the highway rate, as well as to the poor rate, unless it be expressly exempted by the act of Parliament.

CHANTER *v.* GLUBB, E. T. 1829, K. B. 9 *B. & C.* 479.

A lessee of tithes is an occupier within the 13 Geo. 3, c. 78, and liable to be rated.

A PARTY, lessee for years of tithes, who compounded by parol with the occupiers of the land for money payments, paid half-yearly, under which they retained the tithes, without any bargain or sale thereof when mature, and without reference to any specific mode of cultivating the lands—

Held, to be an occupier of tithes, within the Highway Act, and liable to be rated as such.

REX *v.* SIVITER, T. T. 1835. K. B. 5 *N. & M.* 125.

Exemptions in a charter from highway rate, do not extend to the duty imposed by the statutes.

ON appeal against a conviction of Samuel Siviter, for neglecting to perform statute duty on the highways. It appeared that the appellant claimed to be exempt from performing statute duty on the highways, on the ground that all the tenants of demesne lands in King's Winford were by charter so exempt, and that he, being an occupier of demesne lands in that parish, was not liable to the performance of that duty.

Lord *Denman*, C. J.—If an act of Parliament says that certain persons shall pay certain penalties, or perform certain duties, I do not see how it can be an answer to say, that those persons were exempted before the act passed, by the terms of a charter.

REX *v.* JUSTICES OF YORKSHIRE, H. T. 1827. K. B. 6 *B. & C.* 152.

The assessment, before being submitted to the petty sessions, must be exhibited before a single justice, to enable him to exercise his judgment on it.

A MAGISTRATE referred to the special sessions the accounts of a surveyor, without having first examined them himself. Upon a rule to shew cause why a writ of certiorari should not issue, directed to them, to remove into this Court a certain order made by them, for the allowance of the accounts of the overseers of the highways—

The Court said, the act directs that the special sessions may allow or disallow the accounts referred to them by the single justice, after the parts objected to by such justice shall have been explained, and verified by proper evidence. Here the justice had taken no objection. He could not do so, as he had not the assessments before him.

REX *v.* MIREHOUSE, E. T. 1836. K. B. 2 *Ad. & E.* 632.—S. P. REX *v.* GRÆME, *Ibid.* 615.

A mandamus will not lie to justices to compel them to issue a warrant of distress, where legality of rate is doubtful.

UPON an application against justices for a mandamus to compel them to issue a distress warrant for highway rates, which were disputed on several grounds—

The Court considering it doubtful, whether the lands were liable to the rate, and the justices having been threatened with an action, and no indemnity offered, and that the proper tribunal to decide upon the legality of the rate, the sessions, had not been resorted to, refused the rule with costs.

MORELL *v.* HARVEY, H. T. 1836. K. B. 6 *N. & M.* 35.

A cognizance, under a warrant for the rate, must allege it to have been an equal assessment *on the yearly value of the lands.*

REPLEVIN. Cognizance by a constable justifying the taking of goods, as a levy for a highway rate or assessment, made jointly, for the purposes specified in the 30th, and those specified in the 45th sects. of the 13 Geo. 3, c. 78. The rate was alleged to have been an equal assessment of 9*d.* in the pound upon the yearly value.

The Court held, that the mere statement of its being an equal assessment of 9*d.* in the pound made the cognizance bad on special demurrer.

(*b*) SINCE THE 5 & 6 WILL. 4.

REGINA *v.* BIRCH, H. T. 1839. Q. B. 9 *Ad. & E.* 820; S. C. 1 *P. & D.* 586.

Under the 5 & 6 Will. 4, c. 50, where several tithings constitute one Board for the purpose of making rates, they cannot make separate rates applying to each tithing*.

A PARISH, consisting of several tithings, each of which maintained its own highways, a Board of surveyors was formed under the 5 & 6 Will. 4, c. 50, s. 18, for the whole parish. The objection to the Board was, that by sect. 5 the word "parish," signifying every place maintaining its own highways, and the Board is to be formed for that place. In the present case, though each tithing maintains its own highways, there is not a Board for each tithing, but one Board for all. As to the acting of the surveyors of the borough tithing, it is clear that they were acting as part of the Board, and not in their character of surveyors.

Per Cur.—(*Littledale*, J., *Williams*, J., and *Coleridge*, J.)—The Board was clearly illegal, and the rate made by it is bad and must be quashed.

MORRELL *v.* MARTIN, M. T. 1840. C. P. 6 *Bing. N. S.* 373; S. C. 8 *Scott*, 688.

In replevin, to try the legality of a rate, an inhabitant is a competent witness under the 54 Geo. 3, c. 170, s. 9.

IN an action of replevin, on a warrant to levy a highway-rate, the defendant, in support of his cognizance, called the surveyor as a witness.

The Court held, that his incompetency on the ground of being an inhabitant was removed by 54 Geo. 3, c. 170, s. 9.

* In trespass for seizing goods for highway and poor rates, but no notice of action given, the defendant being entitled to it under the highway acts:—Held, that the action was maintainable in respect of the goods wrongfully taken for the poor-rate. (*Lamont* v. *Southall*, T. T. 1839, Ex., 7 D. P. C. 469).

VI. RELATIVE TO THE DIVERTING, CHANGING, AND STOPPING UP, BEFORE 5 & 6 WILL. 4.

REX *v.* JUSTICES OF SURREY, H. T. 1826. K. B. 5 *B. & C.* 241.

Under the Highway Act, the proper officer for giving notice of diverting, is the high constable of the district.

A RULE was obtained in this case, raising the question, whether the notice of holding a special sessions under 55 Geo. 3, c. 68, s. 2, in order to divert a highway, might be served by the clerk of the magistrates and not by the high constable of the division.

The Court decided, that the words "other proper officer," meant an officer of a corporation, analogous to a high constable in a hundred. The notices should be given by a proper officer, who would be liable to punishment if he neglected his duty, as the constable.

REX *v.* KENYON*, E. T. 1827. K. B. 6 *B. & C.* 640.

An order for stopping up highways must shew that they were in the particular parish, and the length and breadth of the road stopped up;

UPON objections to an order for stopping up unnecessary footways, under 55 Geo. 3, c. 68, s. 2, one was described as passing across the lands of R. W., in the parish of T.; another described as across the said lands of the said R. W., and two others, as across the lands of the said R. W., for that it did not sufficiently describe the parish in which the last of them lay; and secondly, that it did not describe their length or breadth, nor order them to be sold.

The Court held, 1st, that as to the latter the order was bad; there being nothing to shew that they were in the parish of T., and the Court would not assume that the lands were the said lands:—Held, 2dly, that it was necessary that the order should state the length and breadth of the road stopped up, in order that it might be known what was to be afterwards sold; and semble, the order under the 55 Geo. 3, c. 68, should be to stop up and sell.

REX *v.* JUSTICES OF KENT, H. T. 1830. K. B. 10 *B. & C.* 477.—S. P. REX *v.* JUSTICES OF WORCESTERSHIRE, E. T. 1828. K. B. S. P. REX *v.* ROGERS, E. T. 1828. K. B. 8 *B. & C.* 254; 2 *M. & R.* 289.

and that the justices had view of the course proposed;

THIS case came before the Court in the form of a rule to shew cause why a certiorari should not issue directed to the justices of Kent, commanding them to return into this Court an order made by two justices, at a special sessions, for diverting and turning parts of a public highway. It was objected, that the order did not state that the justices had viewed the course of the new highway according to No. 21 of the schedule to the act 13 Geo. 3, c. 78.

Per Cur.—The objection is fatal, as the justices have no jurisdiction unless they view the course of the proposed new road. The form given in the schedule for such an order as this states that the justices have so viewed.—Order of sessions quashed.

REX *v.* JUSTICES OF CAMBRIDGESHIRE, M. T. 1835. K. B. 5 *N. & M.* 440.—S. P. REX *v.* MARQUIS OF DEVONSHIRE, H. T. 1836. K. B. 6 *N. & M.* 92.

and the view should be taken

AN order of justices for stopping up a highway as unnecessary was as follows:—"We, &c., having upon view found a certain part

* Semble overruled. See p. 188, *Rex* v. *Glover*, 1 B. & Ad. 483.

of a common King's highway unnecessary, do hereby order the same to be stopped up; and we do order the surveyor of the highway, &c., to sell to J. A., the owner of the adjoining land, &c., if not to some other person or persons, for the full value thereof."

by the justices together, and the finding the result of such view;

Per Cur.—It is said that the order is void, inasmuch as it does not shew that the justices had full jurisdiction. The first objection which has been made is, that the order did not state upon whose view it was made; that, consistently with the terms of the order, the view might have been as well by any other person as by the justices; and that the order does not state that the view was had by the two justices concurrently. The objection, that they did not take the view together would be a valid objection if that appeared upon the order to have been the case, as no view is sufficient to warrant the justices in proceeding, unless it be taken by them concurrently. It is, however, to be presumed that in what they did the justices were acting together; and that it was upon a view taken by them together that they proceeded.

REX *v.* WINTER, M. T. 1828. K. B. 8 *B. & C.* 785.

and that the substituted way would confer as permanent a right as the road stopped up.

UPON an order for stopping up a way being removed by certiorari, it was objected that the order was defective in not shewing that the public, from whom a permanent right was taken away, had a permanent right in return.

Bayley, J.—We need not at present decide the point, whether a public road can be partially stopped up. I am clearly of opinion, that, where magistrates, acting under the limited power given them by Parliament, propose to take away a permanent right of the public, their order should shew that they are giving in return something equally permanent. That has not been done in the present instance. If the road was made under any other act, or if the public will have a permanent right over it under the local act, one or other of those facts should be made to appear. But the order and the case are equally silent as to the supposed permanent right of the public over that part of the substituted road.

REX *v.* MILVERTON, M. T. 1836. K. B. 1 *N. & P.* 179.—S. P. REX *v.* JUSTICES OF MIDDLESEX, H. T. 1836. K. B. 1 *N. & P.* 92.

And, if there be several roads in separate parishes, there must be a separate order for each.

ON motion to quash an order for stopping up roads, it appeared that the road stopped up was, as to part, wholly situate in one parish; and, as to another part running between two parishes, partly in one and partly in another parish.

The Court held, that the order stopping up so much as lay in one parish was invalid, and that one order cannot be made for stopping up separate and distinct roads, but there must be a separate order for each.

See Davidson v. *Gill*, 1 *East*, 64; *and Rex* v. *Justices of Kent*, 10 *B. & Cr.* 477.

REX *v.* GLOVER, M. T. 1830. K. B. 1 *B. & Ad.* 483; *overruling* REX *v.* KENYON, E. T. 1827. K. B. 6 *B. & C.* 640.

Under 55 Geo. 3, c. 68, an order may be made for stopping up an unnecessary footway without ordering a sale.

AN order of justices for stopping up, as unnecessary, a footway, had been removed into this Court by certiorari. The only point raised was, whether the order for stopping up the footway should also have directed the footway to be sold.

Per Cur.—It is scarcely necessary for us to say that we feel the greatest respect for our learned Brothers who decided the case of *The King* v. *Kenyon*, (6 B. & C. 640); but we are bound to say, that, in the construction they gave the act of Parliament, they were mistaken as to this objection. We think that where an order is made under the 55 Geo. 3, c. 68, s. 2, not for diverting or turning, but for entirely stopping up a footway as unnecessary, it is not requisite to direct that the footway so stopped up should be sold.

THACKRAH *v.* SEYMOUR, M. T. 1832. Ex. 1 *C. & M.* 18; S. C. 3 *Tyrw.* 87.

Public way over a waste afterwards inclosed can only be stopped up by the surveyor, with the consent of two justices, under 41 Geo. 3, c. 109*.

A PUBLIC footway, which passed over ancient inclosures and waste lands, was afterwards inclosed under an act which gave no powers to stop up old roads.

The Court held, that, under the powers given by the General Inclosure Act, (41 Geo. 3, c. 109, s. 8), the surveyor could only do so with the consent of two justices, and that not having been done the old way was not extinguished.

REX *v.* JUSTICES OF SUFFOLK, M. T. 1826. K. B. 6 *B. & C.* 110.

Notices signed by the chief constables, and served by their order on the justices, is a giving by them within the 13 Geo. 3, c. 78, s. 62.*

IN this case a rule nisi had been obtained for a mandamus, commanding the court of quarter sessions to confirm and inrol an order of justices (under the acts 13 Geo. 3, c. 78, and 55 Geo. 3, c. 68) for stopping up a certain bridleway and footway. It was contended, that the statutes whence the special sessions derived authority required that all the magistrates acting in and for the divisions should receive notice, and that the notice should be given by the high constable or other proper officer. The case of *The King* v. *The Justices of Surrey* (5 B. & C. 241) was relied on; but it was argued contra, that this case was distinguishable from that of *The King* v. *The Justices of Surrey*; there the chief constable had not even signed the notice, which, on that account, was held not to be given in the way enjoined by the statute.

And of that opinion were the Court, holding that service of notice by the chief constable in person was not necessary.

* An order for stopping up an old road referred to the plans annexed, and did not state the termini:—Held sufficient, as to the latter, but not the former, if there were no plans. (*Rex* v. *Horner*, 2 B. & Ad. 150).

VII. RELATIVE TO APPEALS CONNECTED WITH, BEFORE 5 & 6 WILL. 4.

REX *v.* JUSTICES OF ESSEX, E. T. 1826. K. B. 5 *B. & C.* 431; S. C. 7 *D. & R.* 658.

At one time notice of appeal for stopping up or diverting a public highway must have stated that the appellant was aggrieved*.

GEORGE FROST, at the Epiphany sessions for the county of Essex, appealed against an order made by two justices for diverting and turning a certain part of a public footway, in the parish of Mountnessey, in the county of Essex. The notice of appeal stated that George Frost, of the parish of Mountnessey, a rated inhabitant of the said parish, intended to appeal against the order, but omitted to state that he was injured or aggrieved by the order.

Per Cur.—We are of opinion, that, taking the whole of the statutes, without laying down any general rule of construction, the appellant ought to have stated in his notice that he was aggrieved.

REX *v.* JUSTICES OF YORKSHIRE, H. T. 1828. K. B. 7 *B. & C.* 678; S. C. 1 *M. & Ry.* 547, *supporting* REX *v.* JUSTICES OF ESSEX, 5 *B. & C.* 431, *supra.*

And the same view was taken in another case.

ON motion for a mandamus, the affidavit stated that due notice of appeal had been given, but that the court of quarter sessions had refused to hear the said appeal, being of opinion that the said notice, not stating that appellants were injured or aggrieved, was insufficient. The Court took time to consider, and—

Lord *Tenterden* stated that, on the best consideration the Court could apply to the subject, they were unanimously of opinion that the judgment in the *King* v. *Justices of Essex* ought not to be overruled.

REX *v.* JUSTICES OF WEST RIDING OF YORKSHIRE, E. T. 1833. K. B. 1 *N. & M.* 426.

But in a later case it was held that the notice of appeal need not state in terms that the appellant is aggrieved; it is sufficient if he allege a fact shewing him to be so.

ON the 28th of May, two of the magistrates of the West Riding of Yorkshire met, and viewed certain footpaths, and certain proposed diversions of the same, and having received evidence that the magistrates in the division or district had been summoned to attend the meeting pursuant to the 55 Geo. 3, c. 68, made their orders for the diversion of the footpath. Mr. Power, who was the proprietor of a farm over which the footpath ran, being disatisfied with the intended diversion, gave notice of appeal. The notice of appeal was dated the 28th of June, 1832, and did not in terms state that he was aggrieved, but stated facts, from which his being a party aggrieved must necessarily be inferred. At the sessions it was objected that the notice was insufficient, but the sessions overruled the objection.—And the Court said the court of sessions were right in overruling the objection, that the party had not in the notice stated in terms

* The statute expressly requiring at least ten days' notice of appeal, a rule of sessions, regulating the time of notice, is inapplicable, which can only prevail where no time is fixed by law; and, in construing the statute, one day is to be reckoned inclusive, and the other exclusive. (*Rex* v. *Justices of West Riding of Yorkshire*, 1 N. & M. 426; abridged, post).

that he was a party aggrieved. He speaks of the fact, that he and his tenants, occupiers, &c., would sustain inconvenience and delay.

REX *v.* ADEY, H. T. 1835. K. B. 4 *N. & M.* 365.

And now the notice of appeal need not expressly state that the parties were aggrieved by the order.

THE notice of appeal against an order for stopping up an unnecessary highway, given by several inhabitants of a place, concluded by stating the grounds to be, that they would be compelled to go a greater distance to the next market-town, from their respective residences, than if the road intended to be stopped were put and kept in a state of proper repair; but did not expressly state that they were aggrieved by the order:—Held, a sufficient notice within the 55 Geo. 3, c. 68, s. 3, though the preceding cases were relied on.

VIII. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) BEFORE 5 & 6 WILL. 4.

ADDISON *v.* ROUND, E. T. 1836. K. B. 6 *N. & M.* 422; S. C. 4 *Ad. & E.* 799.

The churchwardens and overseers cannot maintain trover for the highway books unless actually paid for by them.

TROVER by the plaintiffs, as churchwardens and overseers of the parish of Wednesbury, to recover certain books and accounts which had been in the custody of the defendant, as waywarden of that parish.

The Court held, that the action could not be maintained against the ex-waywarden for the highway books, &c., kept by him during the period he was in office, and with the possession of which he had never parted, unless the churchwardens, &c., had actually paid for the books.

(*b*) SINCE 5 & 6 WILL. 4.

RIX *v.* BORTSON, T. T. 1840. Q. B. 4 *P. & D.* 182.

The notice of action to be given under the Highway Act, (5 & 6 Will. 4), does not repeal the 24 Geo. 2.

IN an action for trespass and false imprisonment against justices upon an illegal conviction, under the Highway Act, (5 & 6 Will. 4, c. 50, s. 75), the Court held that the clause giving twenty-one days' notice of action did not repeal the clause in 24 Geo. 2, c. 24, requiring the notice, in case of actions against the justices, to be given one month before the suing out of the writ.

CALVERT *v.* MOGGS, T. T. 1839. Q. B. 2 *P. & D.* 543.

The plea must be pleaded as "under the statute," under 5 & 6 Will. 4.

DEBT for goods sold and delivered, money paid, and on an account stated. Pleas (before Rule of T. T. 1838, directing the defendants who plead the general issue by statute without the words "by statute" in the margin), nil debet and payment. On demurrer to the former plea, it not appearing on the face of the plea whether the plea was pleaded under the 5 & 6 Will. 4, or not—

The Court held that the plea was at all events bad, in answer to the count on an account stated.

IX. RELATIVE TO INDICTMENTS, BEFORE 5 & 6 WILL. 4.

REX *v.* KNIGHT, M. T. 1827. K. B. 7 *B. & C.* 413; S. C. 1 *M. & Ry.* 217.

An indictment, after stating the parish, may use the word "there*."

INDICTMENT charging defendants with obstructing a highway, by removing a culvert, in the parish of S., opposite to a mill there, in a certain king's highway there, leading from S. to H.—

The Court held the averment to be a sufficient allegation of the defendant's having obstructed a road in the parish of S.

REX *v.* AUCKLAND, T. T. 1835. K. B. 1 *Ad. & E.* 744.

The indictment must shew the highway to be in the parish indicted.

UPON an indictment against the inhabitants of certain townships within a parish for non-repairs of highways—

The Court held, that the indictment was bad, for not shewing that the highways were within the townships indicted, but only that they were within the town of A., in the parish of B. C., and in shewing no consideration for the liability of the defendants; and the Court would not intend that it was a liability charged on the whole parish, or that the townships indicted made up the whole parish.

REX *v.* MARQUIS OF DOWNSHIRE, M. T. 1835. K. B. 5 *N. & M.* 662.

Description as a road towards and unto the parish church of C. suffices, although it in fact made a circuitous angle.

IN an indictment for non-repair of a public highway, the part alleged to be out of repair was "from a certain turnpike road, towards and unto the parish church;" and the way proved was from the turnpike gate entering the churchyard, from which there was a public way along the wall of the churchyard, which led to a new way, which, making an acute angle with the first, led directly to the church.

The Court held, that the way was well described as a way leading towards and unto the church.

REX *v.* LYON, H. T. 1825. K. B. 5 *D. & R.* 497; S. C. 1 *R. & Moo.* 151; S. C. 1 *C. & P.* 527.

Describing it as a highway for all the liege subjects, with horses, carriages, &c., suffices, although, on passing under an arch, it

INDICTMENT for a nuisance in obstructing a common highway, which was laid in the indictment to be a common highway for carts and carriages, &c. It appeared that the whole of the streets, lanes, and passages had been built on the estate of a person named Harrison, and that the way in question was arched, having buildings over it; it also appeared that all ordinary carriages could pass along it under the archway, but that a waggon loaded very highly, as road waggons

* If a parish be indicted for the non-repair of a pack and prime way, and if it be proved that the way is a carriage-way, this is a misdescription of the way, and the defendants are entitled to be acquitted. In an indictment for non-repair of a highway, it is not necessary to state the termini; but if they are stated, they must be proved. (*Rex* v. *Inhabitants of St. Weonards*, 1834, N. P., 6 C. & P. 582).

could not be used except as a particular way*.

and waggons carrying cotton usually are, could not pass under this arch for want of height.

Per Cur.—The highway may be laid as a common highway for carts, carriages, &c., although it has always been arched over, provided that it is capable of being used by all ordinary carriages.

REX *v.* EASTINGTON, M. T. 1836. K. B. 1 *N. & P.* 193.

A plea to an indictment for non-repair must, if exempt by custom, allege the parish otherwise would have been liable.

ON an indictment against the parish for non-repair of a highway within it, alleging the liability of the parish at large; plea, stating that a township had always been accustomed and of right ought to repair, traversing the liability of the parish at large to repair, and issue on the custom found for the defendants—

The Court held, first, that, the custom being in favour of the defendants, judgment for the Crown could not be entered non obstante veredicto; and secondly, that the plea was bad, for not averring in direct terms that the parish would have been liable but for the custom,—and judgment arrested.

X. RELATIVE TO PRESENTMENTS, BEFORE 5 & 6 WILL. 4.

REX *v.* INHABITANTS OF FYLINGDALES, M. T. 1827. K. B. 7 *B. & C.* 438; S. C. 1 *M. & Ry.* 176.

A presentment by a surveyor must shew he was appointed for the particular parish.

ON a rule to arrest the judgment upon a presentment of the defendants, for the non-repair of a road, on the ground that the information upon which the presentment was made had been given by the surveyor of the riding, instead of the surveyor of the township in which the road was situate—

The Court held, that the information of the surveyor of highways, upon which justices of the peace are authorized by the 13 Geo. 3, c. 78, s. 24, to make presentments of highways, &c., out of repair, must be given by a surveyor of the township, parish, or place in which the highway presented is situate.

XI. RELATIVE TO EVIDENCE, BEFORE 5 & 6 WILL. 4.

REX *v.* INHABITANTS OF SCARESBRICK, E. T. 1837. K. B. 1 *N. & P.* 582.

The effect of, or what amounts to an agreement to repair, is strictly a question for the jury.

ON an indictment against a township for non-repair of a highway, the defendants proved an agreement between the owner of all the lands in their township, and the owner of all the lands in an adjoining township, made in the reign of Queen Elizabeth, by which it was agreed that a road should be formed through both townships, to be repaired in equal moieties; and that a stone was fixed at a place in the defendants' township, to mark a portion therein which was to be repaired by the adjoining township, and which part was

* Where one inhabitant has removed an indictment for the non-repair of a road, and entered into the usual recognizance, the Court refused to allow the inhabitants to plead guilty to the indictment. (*Rex* v. *Inhabitants of Luxborough*, H. T. 1833, B. C., 1 D. P. C. 527).

the subject of the indictment. The agreement contained a stipulation that a further assurance should be prepared by a lawyer, but none was produced. Repairs were proved to have been done by the adjoining township for two centuries.

The Court held, that the Judge ought not to have advised the jury to find that there had been some legal charge created upon the lands in that adjoining township to repair this road.

XII. RELATIVE TO WITNESSES.

(*a*) Before the 5 & 6 Will. 4.

Rex *v.* Auckland, M. T. 1834. K. B. 1 *Ad. & E.* 744.

Upon an indictment against the inhabitants of certain townships within a parish for non-repairs of highways—

Under 54 Geo. 3, c. 170*, rated inhabitants are incompetent†.

The Court held, that rated inhabitants of the several townships were not rendered competent witnesses by the 54 Geo. 3, c. 170, s. 9, and that it made no difference that the inhabitants were charged conjointly.

(*b*) Since the 5 & 6 Will. 4.

Regina *v.* Bliss, M. T. 1837. Q. B. 2 *N. & P.* 464.

On an indictment against the owner of land for obstructing a highway, where the question was whether it was a public or private way, a witness stated that a former occupier of the land over which it ran had planted a willow tree, and was asked what he had said when he so planted it, and replied, that he said he planted it to mark out the boundary of the way, as he knew it when a boy.

So, on an indictment for obstructing a highway, the declaration of a deceased occupier is inadmissible.

The Court held, that this declaration was not admissible, either by way of reputation, or as accompanying an act, or as made against the interest of the party making it, since he could not bind the interest of his landlord.

XIII. RELATIVE TO JUDGMENTS CONNECTED WITH, SINCE 5 & 6 Will. 4.

Rex *v.* Inhabitants of Mawgan in Meneage, T. T. 1838. Q. B. 3 *N. & P.* 502.

A presentment, under the 13 Geo. 3, c. 78, was in progress, when the 5 & 6 Will. 4, c. 50, which repealed that statute, came into operation.

If a presentment under a statute be removed into K. B., and before judgment that

Per Cur.—These proceedings must be on the same footing as if the 13 Geo. 3, c. 78, never existed. According to that statute,

* At Nisi Prius it was held, that the 54 Geo. 3, c. 170, s. 9, makes inhabitants competent witnesses as to the repair of highways; (*Rex* v. *Hayman*, 1829, N. P., 1 M. & Malk. 401; and see *Heudebourch* v. *Langston*, Id. 402, n., and 3 C. & P. 566).

† An indictment for not repairing a highway, not being "a matter relating to the rates or cesses," within the 54 Geo. 3, c. 170. (*Rex* v. *Bishop Auckland*, 1836, N. P., 2 M. & Rob. 286).

statute be repealed, the Court will not give judgment.

the prosecution by the presentment shall proceed in the usual way as by indictment, and it is provided that the Court shall afterwards proceed to give judgment. Supposing the act had contained a provision for this Court to pass the judgment, that power would have been taken away by the repeal of it; as it is, the statute is repealed, the whole falls to the ground, and we must let the proceedings stop where they are.

XIV. RELATIVE TO COSTS.

(*a*) Before 5 & 6 Will. 4.

Rex *v.* Salwick, E. T. 1831. K. B. 2 *B. & Ad.* 136.

By a special rule as to costs, the case may be taken out of the 13 Geo. 3, c. 78*.

After a road indictment removed by certiorari, and a verdict found for the prosecutors, the defendants moved for and obtained a new trial, upon special terms as to the prosecutor's costs; the defendants having succeeded on the second trial—

The Court held, that the special rule of the Court, as to the terms of the new trial, took the case out of the 64th sect. of the 13 Geo. 3, c. 78, and that the Judge had no power to certify to entitle the defendants to costs.

Rex *v.* Wing, E. T. 1825. K. B. 4 *B. & C.* 184.

Justices are not liable to costs if, after receiving notice of appeal against their order, they abandon it.

After notice of appeal against an order of two justices, for diverting a footway, the justices gave notice to the appellant that they had abandoned the order, which was accordingly never filed with the clerk of the peace.

The Court held, that the justices at the next sessions have no power to award the appellant's costs incurred in preparing to try his appeal. The right to appeal against an order for diverting a footway appears to rest on 55 Geo. 3, c. 68, s. 3, which does not invest the sessions with power to give costs, and not on 13 Geo. 3, c. 78, s. 80, which does.

(*b*) Since 5 & 6 Will. 4†.

* A certificate, that a defence to an indictment for not repairing was frivolous, is operative, notwithstanding the pendency of a rule to arrest the judgment. (*Rex* v. *St. John the Baptist*, 6 M. & S. 130).

† The power to give costs under 5 & 6 Will. 4, c. 50, s. 95, for a frivolous defence to an indictment for not repairing a highway, is confined to the court in which the indictment is preferred, and not where tried; where, therefore, it had been removed by certiorari:—Held, that the Judge had no power to give costs. (*Reg.* v. *Preston*, 1837, N. P., 2 Moo. & R. 137).

A complaint was made to magistrates, under the 94th sect. of the Highway Act, (5 & 6 Will. 4, c. 50), that a way, alleged to be a highway, was out of repair. The magistrates ordered an indictment against the inhabitants of the parish, which was found, and removed by certiorari, and on the trial of it the defendants were acquitted, on the ground that it was not a highway. The prosecutor applied for costs to be paid out of the highway rate, under the 95th section of the act. It was objected, that this provision as to costs only applied where the existence of a highway was not disputed, and also, that it did not apply when the indictment was removed by certiorari. The Judge refused the order. (*Reg.* v. *Inhabitants of Chedworth*, 1840, N. P., 9 C. & P. 285).

The words of 5 & 6 Will. 4, c. 50, s. 95, held imperative; and on a verdict

XV. RELATIVE TO THE CERTIORARI*, BEFORE 5 & 6 WILL. 4.

REX *v.* ST. ALBAN'S, H. T. 1825. K. B. 3 *B. & C.* 698; S. C. 5 *D. & R.* 538.

ON a rule for a certiorari to remove an appointment of surveyors of highways into this Court, in order that the same might be quashed—

Under 13 Geo. 3, c. 78, s. 8, it was said a certiorari was taken away;

Per Cur.—We think, under the 13 Geo. 3, c. 78, that the certiorari is taken away by the general words of the 81st section—"No proceedings to be had or taken in pursuance of this act shall be removed by certiorari into any of his Majesty's Courts of record at Westminster;" quâcunque viâ, therefore, the certiorari is taken away.

REX *v.* JUSTICES OF KENT, H. T. 1831. K. B. 3 *B. & Ad.* 250.

THIS case came before the Court upon a rule for a certiorari. The order gave a full particular of the road, by reference to a plan, which was annexed, and was coloured partly blue and partly yellow; but the notice of stopping up made no reference to the plan, and merely described the road as being between the north-west corner of Woolwich Common and that portion of the turnpike road from Blackheath to Shooter's Hill, which was near the seventh milestone, and stating how many yards were to be stopped up. One objection to the notice was, that it was not given by the party applying for the writ of certiorari.

however, a certiorari can only be issued at the instance of the same party, giving notice to the justices where proceedings are to be removed;

The Court were clearly of opinion that this was a good objection.

REX *v.* JOWL, H. T. 1836. K. B. 5 *D. P. C.* 435; S. C. 1 *N. & P.* 28.

ON motion for a certiorari to remove an indictment for obstructing a highway—

and will not lie on a mere question of fact.

The Court said, where the only ground for removing an indictment for obstruction of a highway, by building thereon, is a question of fact only, and no suggestion of specific difficulty in law suggested, a certiorari must be refused.

REX *v.* JUSTICES OF MIDDLESEX, M. T. 1836. K. B. 1 *N. & P.* 92.

ON the question how the period of six months, given for removing an order for stopping up a public footway, confirmed by an order of sessions, is to be calculated?

The six months, as to removing the order, run from the time it is recorded.

The Court said, that point appears to be disposed of by a variety of cases having reference to 13 Geo. 3, c. 78; and the period of six

against the inhabitants upon an indictment directed by the magistrates, an order was made for the costs of the prosecution to be paid out of the highway rates. (*Reg.* v. *Inhabitants of Yarkhill*, 1839, N. P., 9 C. & P. 218).

* The Court will not discharge a parish from an indictment for non-repair of a highway, removed by certiorari merely on the certificate of its being in repair, until by a winter's wear it appears to have been substantially done. (*Rex* v. *Inhabitants of Witney*, T. T. 1837, B. C., 5 D. P. C. 728).

months, within which the certiorari is to be brought, is not to commence from the time when the original order was made, but from the time when that order is recorded at the sessions.

XVI. RELATIVE TO NEW TRIAL, BEFORE 5 & 6 WILL. 4.

REX *v.* SUTTON, T. T. 1833. K. B. 2 *N. & M.* 57; S. C. 5 *B. & Ad.* 52.

The Court will not grant a new trial on an indictment for non-repair of a highway, but will suspend the judgment until the new one be preferred.

THIS was an indictment for the non-repair of a bridge, ratione tenuræ, the bridge being in the county of Nottingham. In the following term a rule had been obtained for a new trial, on the ground of evidence having been improperly rejected, and the jury having been misdirected by *Park*, J. On shewing cause, it was contended, first, that the Court had no power to set aside a verdict for a defendant, on a prosecution for a misdemeanor. But it was admitted that the Court had the power to suspend the entry of the judgment for the defendant to prevent his giving it in evidence on the trial of another indictment. This was done in *The King* v. *The Inhabitants of Wandsworth*, (1 B. & Ald. 63), and the cases there cited.

Per Cur.—We are not disposed to do more than follow the precedent in the case of *Rex* v. *Wandsworth*, and to suspend the entry of the judgment until after the trial of the new indictment.

Holiday*.

BENNETT *v.* POTTER, T. T. 1832. Ex. 2. *C. & J.* 622.

The plaintiff may open the office on a holi-

THE time for pleading having expired on the 11th, which was a holiday, the plaintiff opened the office at six in the evening, and signed judgment. A plea was delivered at eight.

* By 3 & 4 Will. 4, c. 42, s. 43.—"Whereas the observance of holidays in the said courts of common law during term time, and in offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient and tends to delay in the administration of justice; be it therefore enacted, by the authority aforesaid, that none of the several days mentioned in the statute, passed in the sessions of Parliament, holden in the fifth and sixth years of the reign of King Edward the Sixth, intituled 'An Act for keeping Holidays and Fasting Days,' shall be observed or kept in the said courts, or in the several offices belonging thereto, except Sundays, the day of the nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week."

By Reg. Gen. 7 Bing. N. S. 615, H. T. 1836; S. R. 1 M. & W. 5; S. R. 1 Tyr. & Gr. 237; S. R. 4 Ad. & E. 743. "Whereas, by the Act of the 3 & 4 Will. 4, c. 42, s. 43, it is enacted, that none of the several days mentioned in the statute passed in the sessions of Parliament, holden in the 5th & 6th years of the reign of King Edward 6, intituled 'An Act for Keeping Holidays and Fasting Days,' shall be observed or kept in the courts of common law, or in the several offices belonging thereto, except Sundays, the day of the Nativity of our Lord and three following days, and Monday and Tuesday in Easter week: It is hereby ordered, that, henceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said courts; viz. Good Friday and Easter Eve, and such of the five days following as may not fall in the time of term, but not otherwise; the birthday of our lord the King, the birthday of our lady the Queen, the day of the accession of our lord the King, Whit-Monday and Whit-Tuesday."

By Rule H. T. 2 Will. 4, it is ordered, "That in all cases in which any par-

Lord *Lyndhurst*.—The office may be opened at any time, when it is regularly shut. It is closed on a holiday for the benefit of the officers, and if they think fit to attend they may.—Rule refused.

day for the purpose of signing judgment.

Homicide. See tit. *Murder*.

Horses*.

See tits. *Gaming—Lien—Post-Horse Act—Wager—Warranty*.

ELMORE *v.* KINGSCOTE, T. T. 1826. K. B. 5 *B. & C.* 583; 8 *D. & R.* 343.

IN an action brought to recover the price of a horse, alleged to have been sold to the defendant, proof was given that, on the 13th of June, there was a verbal contract of sale made between the plaintiff and defendant, by which the plaintiff had agreed to sell to the defendant the horse, warranted five years old, for the sum of two hundred guineas. In order to take the case out of the Statute of Frauds, the plaintiff gave in evidence a conditional letter, which did not even state the price of the horse. *Abbott*, C. J., thought the letter not a sufficient memorandum within the Statute of Frauds, and the plaintiff was nonsuited. On motion to set the nonsuit aside—

A memorandum for the sale of a horse without inserting the price is not a sufficient memorandum within the Statute of Frauds.

The Court refused to interfere, being of opinion, at all events, that the price agreed to be paid should have been stated.

ticular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast, or thanksgiving, in which case the time shall be reckoned exclusively of that day also."

By Rule E. T. 2 Will. 4, it is ordered, "That the days between Thursday next before and the Wednesday next after Easter-day shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trials, or notices of inquiry, in any of the courts of law at Westminster."

The 5th of November, during the time of morning service, is a holiday; when, therefore, it did not appear that the application was made out of that time, the Court discharged an application against the signer of writs, for refusing to sign an attachment on that day, with costs. (*Day* v. *Signer of the Writs*, 6 M. & S. 136).

* *As to stealing horses.*]—By 7 & 8 Geo. 4, c. 29, s. 25, it is enacted, "That if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb; or shall wilfully kill any such cattle, with intent to steal the carcase or skin, or any part of the cattle so killed; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

Taking away a horse, not with a view of stealing it, but other articles, not horse-stealing. (*Rex* v. *Crump*, 1825, N. P., 1 C. & P. 658).

If a thief go to an inn, and intending to steal a horse, direct the ostler to bring out his horse, pointing to that of the prosecutor, and the ostler, at his desire, lead out the horse for the prisoner to mount:—This is a sufficient taking by the prisoner to support an indictment for horse-stealing. (*Rex* v. *Pitman*, 1826, N. P. 2 C. & P. 423).

The 7 & 8 Geo. 4, c. 30, applies to injuring a mare by pouring poison into its ear and eyes, so as to cause it to be killed. (*Rex* v. *Owen*, 1828, 1 Moody, C. C. 205.

Horse-slaughtering.]—See 26 Geo. 3, c. 71; 5 & 6 Will. 4, c. 59.

BROGDEN *v.* MARRIOTT, H. T. 1836. C. P. 2 *Bing. N. S.* 473; S. C. 2 *Scott*, 703.

When a horse is to trot at a certain rate, to the satisfaction of a named party, the defendant must obtain his attendance*.

THE declaration set out a contract whereby the plaintiff undertook to buy the defendant's horse for 1*s.* then paid, with a condition that he should pay 200 guineas if the horse trotted 18 miles within the hour, within one month, to the satisfaction of J. N., alleging that the horse had failed on the trial. Plea, 1st, that within one month the defendant gave notice of another trial, but J. N. did not attend; and, 2dly, that the first failure was occasioned by a person acting as the plaintiff's servant. On demurrer—

The Court held the pleas bad, and that such condition was a condition subsequent, and that it lay on the defendant to procure the attendance of J. N.

Hospital.

BURLS *v.* SMITH, M. T. 1830. C. P. 7 *Bing.* 705; S. C. 5 *M. & P.* 735.

Members of a committee of an hospital who manage its concerns are personally liable†.

IN assumpsit it appeared that the affairs of an hospital were managed by a committee appointed by the subscribers at large, of whom the defendant was one of the committee; he had issued directions for the management, and signed cheques for the payment of the tradesmen's accounts.

The Court held that the subscribers, who attend a committee for managing the concerns of an hospital, are liable to the creditors of the hospital; and the proper question for the consideration of the jury is, whether the defendant had so acted as to induce the plaintiff to believe that he was to look to the defendant and the other members of the committee for payment.

See ante, tit. Clubs, and 1 *B. C. C.* 101; 5 *B. & Ad.* 34.

House-breaking‡. See, also, ante, tit. *Burglary*, vol. 2, p. 443, where the statutes are abridged.

* In an action for ill-using a horse let to hire, the stable-keeper need not shew he was licensed; and, if proved to be a mare, the variance is immaterial. (*Ware* v. *Judd*, T. T. 1826, N. P., 2 C. & P. 351).

† Where the defendants were members of a committee of a charity:—Held, that they were liable, if the credit were given to them, as managing the institution, although the goods were ordered by servants in their employ, and no individual contract made with the defendants. (*Glenester* v. *Hunter*, T. T. 1831, N. P., 5 C. & P. 62; S. P. *Pink* v. *Scudamore*, T. T. 1831, N. P., 5 C. & P. 71).

‡ On an indictment under 39 Eliz. c. 15 (housebreaking in the day-time), it must be shewn that it was done at a time of day when there was light enough to distinguish a man's features. (*Rex* v. *Tandy*, 1824, N. P., 1 C. & P. 297). If the sash of a window be partly open, but not sufficiently so to admit a person, the raising it so as to admit a person is not a breaking of the house. (*Rex* v. *Smith*, 1827, 1 Moo. C. C. 178). A. broke into a house, and took two half-sovereigns from a bureau, which he, being disturbed, threw under a grate in the same room:—Held, that this was sufficient to constitute the felony of breaking into a house and stealing within the stat. 7 & 8 Geo. 4, c. 29, s. 12. (*Rex* v. *Amier*, 1834, N. P., 6 C. & P. 344). Stealing in a bedroom, over a stable in a

House of Commons. See tits. *Attachment—Commons, House of—Parliament.*

House of Correction. See tit. *Prison.*

House of Lords. See tit. *Parliament.*

Hue & Cry*.

Hundred†.

I. RELATIVE TO ACTIONS AGAINST.

(*a*) In what cases the hundred were liable, p. 200.

(*b*) By whom maintainable, p. 201.

(*c*) Against whom maintainable, p. 201.

(*d*) Of the declaration, p. 202.

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II. RELATIVE TO THE JURISDICTION OF JUSTICES, p. 203.

yard, not under the same roof, nor having any direct communication with the house in which the prosecutor resides, cannot be properly charged as a stealing in his dwelling-house. (*Rex* v. *Turner*, 1834, N. P., 6 C. & P. 407). An indictment which may apply to either of two different definite offences, and does not specify which, is bad. If clergy (now abolished, 7 & 8 Geo. 4, c. 28, s. 6,) be taken away from several descriptions of compound larcenies, the indictment must specify the description charged, in order to oust a prisoner of his clergy: as a charge of robbing a dwelling-house in the day-time, to the value of five shillings, not shewing whether any person was in the house or not. (*Rex* v. *Marshall*, 1827, 1 Moo. C. C. 158). Dwelling-house described as of several, being partners, but one only resided in it:—Held to be properly described in the indictment. (*Rex* v. *Athea*, 1832, 1 Moo. C. C. 329).

* By 7 & 8 Geo. 4, c. 27, the hundred is no longer liable in cases of robbery.

† The 7 & 8 Geo. 4, c. 31, consolidates the laws relative to remedies against the hundred. By—

Sect. 1. Commencement of act.

Sect. 2. The hundred shall make full compensation for the damage done by rioters in certain cases.

I. RELATIVE TO ACTIONS AGAINST.

(*a*) In what cases the hundred were liable.

Orgill *v.* Smith, E. T. 1818. K. B. 6 *M. & S.* 182.

Under the 53 Geo. 3, lace frames, movable, were not within that statute.

By the 52 Geo. 3, c. 130, to "demolish or pull down any erection and building or engine" is an offence punishable &c.—

The Court held these words to be construed to extend only to engines analogous to an erection or building, and not to lace frames, movable from one part of the building to another, although fixed to the floor to keep them steady, and therefore not within the remedy given by that act against the hundred.

Elsmore *v.* Inhabitants of St. Briavells, T. T. 1828. K. B. 8 *B. & C.* 461.

A building intended, but never used, for a dwelling-house, but in which straw and implements were deposited, was not a building within 9 Geo. 1, c. 22, s. 7.

In an action against the hundred it appeared the building was near to the plaintiff's house; it had been erected, and was originally intended to be used as a house. By one of the witnesses it was called a house; it had windows, and one of the windows had glass in it. There was the usual number of rooms for a house of that description, including a kitchen and parlour, but it had never been inhabited; for nearly two years it had been used as a barn, and straw and timber were placed in it. When consumed it contained straw, boards, and implements of husbandry. *Park*, J., was of opinion that the building was within the description of a "barn," as that word was used in the act, and accordingly the plaintiff obtained a verdict. On motion for a nonsuit—

The Court held the building not to be either house or barn, within the meaning of the stat. 9 Geo. 1, c. 22, consequently the hundred not liable to the owner.

Sect. 3. Party damnified to comply with certain conditions. Limitation of time for actions.

Sect. 4. Process in the action against the hundred to be served on the high constable, who may defend, or let judgment go by default, as advised.

Sect. 5. Inhabitants of the hundred competent witnesses.

Sect. 6. If plaintiff recovers, the sheriff, on receipt of the writ of execution, shall make out a warrant directing the treasurer of the county to pay the amount.

Sect. 7. Mode of reimbursing the high constable for his expenses in defending the action, &c. Reimbursing the county treasurer.

Sect. 8. Mode of proceeding in cases where the damage does not exceed 30*l.*

Sect. 9. Such cases to be settled by the justices at a special petty sessions.

Sect. 10. Penalty on high constable for neglect.

Sect. 11. Proceeding in case of damage to a church or chapel. In case of damage to property belonging to a corporation.

Sect. 12. Where the damage is committed in any county of a city, &c., or in any liberty, &c., which is not within any hundred, or does not contribute to the county rate, such county, liberty, &c., shall be liable like the hundred.

Sect. 13. Provision for executing writs in certain places.

Sect. 14. Mode of reimbursement in liberties, cities, and towns not within any hundred, but contributing to the county rate.

Sect. 15. Mode of reimbursement in counties of cities, and in liberties, cities, and towns not contributing to any rate.

Sect. 16. Act not to extend to Scotland or Ireland.

(*b*) By whom maintainable.

Till-Adam *v.* Inhabitants of Bristol, M. T. 1834. K. B. 4 *N.* & *M.* 144; S. C. 2 *Ad.* & *E.* 389.

Under the 7 & 8 Geo. 4, A. sued the hundred in proper time, but the suit abated; after the expiration of three months, his executor brought another action: —Held, too late.

A testator, in his lifetime, had duly commenced his action against the hundred, to recover compensation for an injury done to premises by a riotous assembly, and afterwards died. His executor, the plaintiff, then brought a fresh action, after the expiration of three months from the time of the offence committed.

Per Cur.—There are two questions: first, whether the executor of a term or for years can, in any case, maintain an action on the stat. of the 7 & 8 Geo. 4, c. 31, s. 2, for an injury done to the premises, under a lease signed in the lifetime of the testator; and secondly, whether, if that be duly commenced and prosecuted by the testator, and abate by his death within three calendar months after the offence is committed, his executor can, subsequent to that time, bring a fresh action. As we are all of opinion that the defendants are entitled to our judgment on the second question, it is unnecessary to consider the first.

Pellew *v.* Inhabitants of Wonford, H. T. 1829. K. B. 9 *B.* & *C.* 134.

Under 9 Geo. 1, c. 22, a reversioner was entitled to sue the hundred for damage*.

On the question whether the plaintiff, who was not the occupier, but was entitled to the reversion of premises feloniously set on fire, was entitled to recover damages against the hundred, under the 9 Geo. 1, c. 22 —

Per Cur.—The question depends upon the construction to be given to the 7th section of the act in question. The words of that section provide, that all and every person and persons who shall sustain damages shall recover; but the amount is afterwards limited to 200*l.* The expression is general, "all and every," and it has nothing to distinguish any particular interest; and we cannot see any thing in the subject-matter from which we can collect an intention to exclude the reversioner, who has often the greater interest. It was argued, that by holding that the reversioner might recover, we should be holding that the occupier might recover; it may be so, and we see no reason why it should not.

See 15 *Ves.* 247.

(*c*) Against whom maintainable†.

Humphries *v.* Inhabitants of Bristol, T. T. 1833. K. B. 2 *N.* & *M.* 74.

Where a district by statute is taken out of

A district was, by a local act, taken out of a county, and annexed to a county of a city, and declared to be part of such county of the city for all purposes except such as were specified in the act.

* Under 9 Geo. 1, c. 22, the act must have been done unlawfully and *maliciously*, as against the owner of the property damaged. (*Curtis* v. *Hundred of Godley*, K. B., 3 B. & C. 248; S. C. 5 D. & R. 73).

† By 2 Will. 4, c. 39, s. 13, "Every writ of summons issued against the inhabitants of a hundred, or other like district, may be served on the high constable hereof, or any one of the high constables thereof; and every such writ issued

a county, and annexed to a county of a city, the county of the city is liable.

The Court held, that an inhabitant of such district was entitled to sue for damages by riot against the inhabitants of such county of the city, notwithstanding it was doubtful how far the defendants could reimburse themselves by compelling such district to contribute.

(*d*) Of the declaration*.

(*e*) Of the evidence.

Duke of Newcastle *v.* Hundred of Broxtowe, M. T. 1832. K. B. 4 *B. & Ad.* 273.

Where it appeared, by usage and reputation for 200 years, that a district had been considered part of a hundred, orders of justices are evidence of reputation†.

In an action against the hundred of Broxtowe for the felonious demolition of Nottingham Castle, the question being whether the castle was or was not locally situate within that hundred, certain orders of magistrates, made from the year 1654 to 1660, stating the castle to be so situate, were produced in evidence. The plaintiff had a verdict. On motion for a new trial, on the ground that such evidence should not have been received—

Per Cur.—It is objected that the orders of sessions, made between 1651 and 1660, were improperly received in evidence. These documents were admitted, not as orders over which the magistrates had jurisdiction, but as evidence of reputation; and in that point of view, we are of opinion that they were admissible. Four of them contain statements shewing that the castle and its precincts are within the wapentake of Broxtowe. That is the statement made by the justices of the peace assembled in sessions, who, although they were not proved to be resident in the county or hundred, must, from the nature and character of their office alone, be presumed to have sufficient acquaintance with the subject-matter to which their declaration relates; and the objection cannot prevail, that they were made after a controversy on that subject had arisen, because there appears to have been no dispute at that time on the particular question, whether the castle and its precincts were in the hundred of Broxtowe or not. These orders, therefore, fall within the established rule as to the admission of evidence of reputation.

against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town or place, not being part of a hundred or other like district, on some peace officer thereof."

* The declaration stated the hundred to be the hundred of S., but there was no such hundred,—it was a borough. The Court allowed the amendment. (*Rex* v. *Inhabitants of Stamford*, T. T. 1833, Ex., 1 C. & M. 773; S. C. 2 D. P. C. 96; S. C. 3 Tyrw. 809; abridged, ante, Vol. 1, p. 166). An allegation in the declaration, "such offenders being then and there unknown," was sufficient, without further alleging, "or any of them." (*Rex* v. *Broxtowe Hundred*, H. T. 1832, K. B., 3 B. & Ad. 550).

† So, where the owner of the premises maliciously set on fire, gave in his own examination:—Held that it was sufficient, without that of his servants, the statute requiring only the evidence of servants "having the care" of the premises, which is to be understood as referring to cases where the master is absent and the premises are left in the charge of servants. (*Rolfe* v. *Inhabitants of Elthorne*, E. T. 1828, N. P., 1 M. & M. 185).

(*f*) Of the damages*.

(*g*) Of the costs†.

II. RELATIVE TO THE JURISDICTION OF JUSTICES.

Rex *v.* Justices of Somerset, M. T. 1825. K. B. 4 *B. & C.* 913.

On a mandamus to compel justices to hear an appeal against an order under the 3 Geo. 4, c. 33, and 9 Geo. 1, c. 22—

The Court held, that the 3 Geo. 4, c. 33, giving the summons against the hundred, where the damages do not exceed 30*l.*, though not providing in terms, yet applies to cases within the 9 Geo. 1, c. 22, s. 7, in the same manner as to those within the other recited acts; and that, although in perusing the statute there has been mistakenly an omission to provide so in terms, the proper construction of it is, to make the sections 2 and 4 co-extensive with the cases to which the recited acts were applicable; therefore, that the justices at petty sessions had jurisdiction, although no riotous or tumultuous assembly proved, and that the sessions, on appeal, might hear the same evidence which the statute makes admissible at the petty sessions, and that the party aggrieved was therefore properly admitted by them.

The justices at petty sessions had jurisdiction, under the 3 Geo. 4, c. 33, in awarding damages in case of riot, &c.;

Rex *v.* Bateman, E. T. 1832. K. B. 1 *N. & M.* 718.

On motion for a mandamus to justices—

The Court held that, to entitle a party who has sustained damages under 30*l.* by the felonious act of rioters, to require, under 7 & 8 Geo. 4, c. 31, s. 8, the holding of a petty sessions for hearing and determining his claim for compensation, it must appear that, within seven days after the commission of the offence, he went before a justice of the peace, and that he has complied with all the other requisites of the section. In the absence of an affidavit verifying these facts (in general terms), the Court will not grant a mandamus for the holding of a petty sessions for such purpose.

but to entitle a party to the holding of a petty session under 7 & 8 Geo. 4, he must have appeared before a justice within seven days.

Rex *v.* Inhabitants of Broxtowe, H. T. 1832. K. B. 3 *B. & Ad.* 550.

In actions against the hundred, on 7 & 8 Geo. 4, c. 31, s. 2, to recover damages during riots—

The Court held, that the persons who are to go before the justices for examination, and enter into recognizances, are those who have the general care and superintendence of the property, and represent their master in his absence, and not all who may have a

The parties to go before the justice must be the owners, or the persons having the management of the property.

* The jury appearing to have assessed the damages done by a mob demolishing the plaintiff's castle at the sum which would replace it in the state it was before the outrage, as nearly as was practicable, the Court refused to disturb the verdict. —(*Rex* v. *Hundred of Broxtowe*, H. T. 1832, K. B., 3 B. & Ad. 550).

† A mandamus will not lie to justices of a town corporate, not within any hundred, nor being a county in itself, for them to raise the costs incurred by the applicants. (*Rex* v. *King's Lynn*, T. T. 1824, K. B., 4 D. & R. 778; S. C. 3 B. & C. 147).

special care of particular parts of it; although, if they speak from the knowledge or information of others, the justices may require such to attend before them.

THE DUKE OF SOMERSET *v.* HUNDRED OF MERE, E. T. 1825. K. B. 4 *B. & C.* 167.

The examination should comprise all the servants of the landlord in possession of and using part of the premises.

THE examination, taken before the justices, according to the 9th Geo. 1, c. 22, s. 8, was only by the steward of the landlord, having the superintendence of the farm on which the fire occurred, it appearing that there were several other servants of the landlord in possession of, and using parts of the premises—

The Court held, that the latter were also to be deemed persons having the care, &c., within the words, "servant or servants," of the act, and ought to have been examined, or it should have been shewn that they had no means of knowledge; and, consequently, that the act had not been complied with, to entitle the party to his remedy against the hundred.

TRIMMER *v.* INHABITANTS OF MUTFORD, E. T. 1825. K. B. 6 *D. & R.* 10.

An information by the owner, taken before justices, that he does not know the person or persons who wilfully set fire to the premises, is insufficient.

IN an action against the hundred on the 9 Geo. 1, c. 22, the plaintiff produced in evidence an attested copy of his examination before a magistrate, taken in pursuance of the statute, from which it appeared that he had there sworn that he (this deponent) doth not know the person or persons who wilfully set fire to his premises. The defendant's counsel objected, that this was not a sufficient allegation of his ignorance of the offenders to satisfy section 8 of the statute, as the words, "or any of them," were not added. The plaintiff was nonsuited. On motion to set the nonsuit aside—

Per Cur.—The case of *Thurtell* v. *Hundred of Mutford*, (3 East, Rep. 400), shews that the provisions of the act must be strictly pursued; and that act provides, that if the offence is effected by one, you shall be examined whether you know that one; if by several, you shall be examined if you know *any* of them.—Rule refused.

Husband and Wife.

See tits. *Adultery—Criminal Conversation—Dower—Marriage.*

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II. RELATIVE TO THE RIGHTS AND LIABILITIES OF THE HUSBAND.

(*a*) RIGHTS OF THE HUSBAND.

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(*b*) LIABILITY OF THE HUSBAND.

1. *Where they cohabit.*

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II. RELATIVE TO THE RIGHTS AND LIABILITIES OF THE HUSBAND—*continued.*

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2. *Where they live separate.*

1.—*In general,* p. 210.

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III. RELATIVE TO THE RIGHTS AND LIABILTY OF THE WIFE.

(*a*) RIGHTS OF THE WIFE, p. 215.

(*b*) LIABILITY OF THE WIFE BEFORE HER HUSBAND'S DEATH.

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IV. RELATIVE TO DEEDS OF SEPARATION, p. 217.

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(*a*) PARTIES TO.

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VII. RELATIVE TO INDICTMENTS, p. 227.

I. RELATIVE TO COHABITATION.

REGINA *v.* MANSFIELD, E. T. 1841. Q. B. 1 *Gale & D.* 7.

The fact of the wife living in adultery with another is not evidence alone of non-access.

IT appeared by the evidence of the woman herself, that she was married, and her husband still alive; that some years after her marriage, she went through the ceremony of marriage by banns with another person, and cohabited with him, and that two children were born to her during such cohabitation. There being no other evidence whatever in the case—

The Court held that, although a married woman be living in open and notorious adultery with a paramour, a child born during such cohabitation cannot be found to be illegitimate, if there is no evidence from which non-access of her husband is to be inferred.

II. RELATIVE TO THE RIGHTS AND LIABILITIES OF THE HUSBAND.

(*a*) RIGHTS OF THE HUSBAND.

1. *Over her Person* and the Children†.*

2. *As to her Property.*

AGAR *v.* BLETHYN, M. T. 1835. Ex. 2 *C., M. & R.* 699; S. C. 1 *Tyrw. & Gr.* 160.

The husband is entitled to all monies accumulated by the wife during separation and living in adultery, although vested by her in trustees for her-

A MARRIED woman separated from her husband, and living in adultery, acquired certain monies, which she deposited at a bankers'. She then married again, her first husband being still alive, and settled that money in trust for the benefit of herself and second husband, and two illegitimate children of her own. She was then tried, and convicted of felony, for which she was afterwards executed. Previous to the trial she and her trustees applied for the money to be employed in her defence, but did not obtain it. The trustees

* Where the wife withdrew from her husband, for no misconduct on his part, and she declared her resolution of leaving him whenever she could:—Held, that having, by stratagem, obtained possession of her person, he was justified, to prevent her eloping from him, in restraining her of her liberty. (*Cochrane, In re*, 8 D. P. C. 630). If a husband, by a deed of separation, executed by himself, but not executed by either of the trustees, give his wife power to live where she pleases, he is not justified in entering the house of a third person to reclaim his wife, as being improperly harboured there; and the husband, before doing so, should at least have given distinct notice to the third person, that, as far as by law he could, he revoked the license. (*Lewis* v. *Ponsford*, 1837, N. P., 8 C. & P. 687).

† Where the father has the custody of the children, and they are obtained from him, the Court will restore them to him, as the legal custody; and will only not act upon its jurisdiction where there is danger in entrusting them to his care. (*Rex* v. *Greenhill*, H. T. 1836, K. B., 6 N. & M. 244; S. C. 4 A. & E. 624).

incurred an extravagant expense for her personal benefit. After her death the first husband and the trustees separately sued the bankers for the money; but, on an interpleader rule, those actions were stayed, and an issue was directed between the husband and the trustees.

self and her illegitimate issue.

The Court held, first, that the first husband was entitled to the money; secondly, that the bankers were to be paid their costs by the plaintiff, and they thought out of the fund; thirdly, that the trustees, not having acted bonâ fide, were not entitled to be paid the expenses which they had incurred in the defence, but were to pay all the costs of the interpleader rule; but semble if they had acted bonâ fide they might have been allowed, by the Court, under the 1 & 2 Will. 4, c. 58, s. 1, to receive the expenses which they had incurred in the defence of their cestui que trust.

GATERS *v.* MADELEY, E. T. 1840. Ex. 6 *M. & W.* 423.

ASSUMPSIT on a promissory note. The declaration stated that the defendant made his promissory note, and delivered the same to E. R. Plea, that it was given to E. R. whilst she was covert, and the wife of J. R., since deceased, and that the consideration was advanced by E. R., whilst she was the wife of J. R., and that E. R. was not executrix or administratrix. Replication, that after the making and delivery of the note to E. R., and during her lifetime, the said J. R. died, without having in his lifetime done any act to reduce the note into possession.

A chose in action, not reduced into the husband's possession on his death, survives to his wife*.

The Court held, that a promissory note given to a woman during coverture, for money advanced by her to the maker during coverture, if not reduced into possession by the husband, survives to her.

(*b*) LIABILITY OF THE HUSBAND.

1. *Where they cohabit.*

1.—*Of the Wife's Agency*†.

M'GEORGE *v.* EGAN, H. T. 1839. C. P. 5 *Bing. N. S.* 196.

IN an action against the husband on a school bill, it appeared that the wife of the defendant took her niece to the plaintiff's

Slight evidence of the wife's

* Where the plaintiff's wife was entitled to certain copyholds, to which she had been admitted before her marriage, and whilst living with her father, and who had always before and after her marriage continued to receive the rents:—Held that, although the possession by the father could not be deemed adverse, but as that of an agent for her before, and for the husband and wife after, the marriage, yet that in order to maintain an action by the husband for money had and received, he must establish some proof of agency, by shewing a privity between himself and the father, or recognition of the daughter's title. (*Clareme* v. *Marshall*, 4 Tyrw. 147). Where, upon the marriage, the wife's stock in trade and articles belonging to her business were vested in trustees for her benefit, and a horse and chaise, (not specified in the schedule), which she always used in carrying on her trade, she being lame, were taken under an execution against the husband; the judge directed the jury to say if they were necessary to her in and about her business, which the jury found; but the Court afterwards, considering it a point of law, as a question of construction of the terms of a deed, granted a rule nisi for entering a nonsuit. (*Dean* v. *Brown*, T. T. 1825. N. P. 2 C. & P. 62).

† The general rule is, that a wife cannot bind her husband by her contract, except as his agent; but in cases of orders given by the wife in those depart-

agency will suffice to fix the husband;

school, and there was slight evidence of her agency in ordinary household expenses. The plaintiff had a verdict.

The Court, considering it some, although slight evidence, to go to the jury, refused to disturb the verdict.

PLIMMER *v.* SELLS, E. T. 1834. K. B. 3 *N. & M.* 422.

as being seen in the counting-house, conducting her husband's business.

IN an action against the husband—

The Court held, that it was competent to a jury to infer agency in a wife, to accept a notice with respect to a particular transaction in her husband's trade, from the circumstance of her being seen twice in his counting-house, appearing to conduct his business with reference to the transaction in question, and on one of these occasions giving directions to the foreman.

SEATON *v.* BENEDICT, M. T. 1828. C. P. 5 *Bing.* 28; S. C. 2 *M. & P.* 66.

The foundation of the husband's liability for necessaries supplied to his wife is the assumption that she acts as his agent.

IN an action for goods sold, it appeared in evidence that the plaintiff was a linen-draper and haberdasher at Richmond, in Surrey, and that the defendant, with his family, occupied furnished apartments in Montpelier Row, Twickenham, at the rent of two guineas per week. The delivery of the goods, which consisted of several pieces of silk, and also silk stockings, gloves, &c., was proved to have been made to the wife of the defendant at the plaintiff's shop, with the exception of one small parcel, which was delivered to her at the defendant's house, but not in the presence of any third person. There was no evidence of any authority by the defendant to the plaintiff, express or implied, to give credit to his (the defendant's) wife, nor did it appear that he had any knowledge of the dealing, or had ever seen any of the articles in his wife's possession. *Burrough*, J., told the jury, that a husband was in law bound to provide his wife with such necessaries as were consistent with the rank in life of the parties; that, if he failed to do this, he would be liable for goods of that description purchased by her; but that, on

ments of her husband's household which she has under her control, or of orders for articles which are necessary for the wife, such as clothes, the jury (if the wife be living with the husband), ought to infer agency, if nothing appear to the contrary; but if the order is excessive in point of extent, and such as the husband never would have authorized, that will alone be sufficient to repel the inference of agency. If it be proved that the wife has a separate income, that of itself goes to repel the inference of agency; and evidence that the plaintiff has made out the invoices to the wife, and has drawn bills of exchange on her for part of the amount, which she has accepted in her own name, payable at her own bankers from her separate funds, also goes to prove that the wife was not acting as the agent of the husband; and the fact that the husband sold some of the goods which were supplied to the wife, and received the money for them, will not of itself make the husband liable in point of law to pay for them; but it is a fact for the consideration of the jury, in determining whether the goods were supplied on the credit of the husband, and whether the wife was the agent of her husband; (*Freestone* v. *Butcher*, M. T. 1840, N. P., 9 C. & P. 643); but where the defendant, having become bankrupt in 1824, did not surrender, and the business was carried on by his wife in 1833, during which period goods in the way of trade were supplied to her, and it was shewn that the husband had been seen a few times at the place, and was arrested in the shop:—Held, to be insufficient evidence to shew that she acted as his agent in carrying on the trade, to charge him. (*Smallpiece* v. *Dawes*, H. T. 1835, N. P., 7 C. & P. 40).

the contrary, if he was in the habit of supplying her with all that was necessary, he was not liable for anything more. The jury found for the plaintiff; and—

The Court refused to interfere.

FILMER *v.* LYNN, H. T. 1835. K. B. 4 *N. & M.* 559.

Whether the wife had authority to order goods, is a question for the jury.

IN an action for goods sold and delivered, the wife had ordered goods to be delivered to a third party, for which the husband, on the following day, accepted a bill, and which was duly paid, and at the same time he ordered goods for himself; the wife subsequently ordered other goods, to be delivered in like manner.

The Court held, that there was evidence to go to the jury, whether the defendant had so conducted himself as to lead the plaintiff to believe that the wife had authority to order the last goods.

MONTAGUE *v.* BENEDICT, H. T. 1825. K. B. 3 *B. & C.* 631; S. C. 5 *D. & R.* 532.

But to render the husband liable for jewels, there must be some evidence of his assent, if she had sufficient on her marriage*.

IN an action for goods sold, it appeared that this action was brought to recover the amount of a bill for jewels and ornaments which had been furnished to his wife; that the defendant, being at chambers all day, knew not that his wife was accustomed to buy expensive articles in his absence; that those jewels and ornaments had been supplied to his wife without his consent or knowledge; and that the plaintiff had applied to the defendant's wife for payment, but that no demand was made upon the defendant. Ultimately he was threatened with these legal proceedings. It also appeared that the defendant's wife was already possessed of jewels and ornaments suitable for her condition in life; and that she had never worn these jewels and ornaments in the presence of her husband.

The Court held, that a gentleman or a special pleader is not answerable for the debt of his wife, contracted for jewels and ornaments whilst she is living with him, if she has already been provided with ornaments fit and proper for her station in life, and he has not any knowledge that such articles have been supplied to her before payment for them has been demanded of him.

2.—*Where she is a sole Trader.*

PETTY *v.* ANDERSON, T. T. 1825. C. P. 3 *Bing.* 170; S. C. 2 *C. & P.* 38.

If the husband interferes with the business of a feme sole trader he is liable.

IN an action for goods sold, it appeared that the wife, during the confinement of her husband in prison, carried on business as a sole trader, but after his discharge he lived with her, assisted in business, and subsisted on the profits, although the rent was paid by the wife and invoices made out in her name; it appeared also that on the plaintiff's applying to the husband for payment, he had said he had better not go to law, or he might get 4*s.* in the pound.

* If articles of jewellery are supplied to a feme covert, while she is living with her husband, assumpsit cannot be maintained against her husband, unless he gave some authority, either express or implied; and in viewing this question, the jury may consider whether the articles were suitable to the state and degree of the husband. (*Montague* v. *Espinasse*, T. T. 1824, N. P., 1 C. & P. 356).

The Court held, that the Judge properly directed the jury, that the defendant was identified with the business, and that the wife acted as his agent.

3.— On Promise to Pay Debt contracted by Wife.*

2. Where they live separate.

1.—In general†.

2.—Absence Abroad‡.

BIRD *v.* JONES, M. T. 1828. K. B. 3 *M. & Ry.* 121.

The husband is not liable for goods supplied

ASSUMPSIT for necessaries provided by plaintiff for the defendant's wife. It appeared that a married woman, for some years subsequent to a separation from her husband, maintained herself,

* A promise by the husband to pay debt contracted by wife, though not otherwise liable, binding on him. (*Harrison* v. *Hall*, T. T. 1832, N. P., 1 M. & Rob. 185).

† Where the goods were supplied to the wife living apart from her husband, who was kept in ignorance of the marriage of his daughter, for whose use the wife had ordered part, and the rest for the purpose of balls, &c., against the express remonstrance of the husband, and to whom the plaintiff never made any reference:—Held, that not being necessary nor suitable, the husband was not liable. (*Atkins* v. *Curwood*, H. T. 1837, N. P., 7 C. & P. 756). So, a husband is not liable for goods furnished to his wife, living apart from him, if she has a sufficient separate maintenance, although no part of it is supplied by the husband. (*Clifford* v. *Laton*, T. T. 1827, N. P., 1 M. & M. 101). And where goods are supplied to a wife, living separate, it is incumbent on the party supplying them to shew that the separation was for a justifiable cause, to enable him to recover; (*Mainwaring* v. *Leslie*, M. T. 1826, N. P., 2 C. & P. 507; S. C. 1 M. & M. 18); but in an action for coals supplied to the wife, living separate:—Held, that the husband was liable, unless the wife be shewn to have a competent provision; and it lies on him to shew that, and a mere notice that he will not pay is not sufficient to relieve him from the liability. Where the tradesman served both, and agreed with the husband not to charge him with the goods supplied to the wife, he could not recover from the husband. (*Dixon* v. *Hurrell*, M. T. 1838, N. P., 8 C. & P. 717). Where, in an action against the husband for supplies to the wife, living separate, and only a payment of a sum into Court pleaded:—Held, that the defendant thereby admitting the authority to contract, it was a question only of amount; but that she could not pledge his credit beyond what would be reasonable and necessary for her subsistence. The bill (140*l.*) being for horses and carriage, let on hire for 10 months, and 73*l.* paid into Court, the jury found for the defendant. (*Emmett* v. *Norton*. T. T. 1838, N. P., 3 C. & P. 506). A person is only liable to pay for goods supplied to his wife upon the ground of an implied contract; and it is not for the defendant to prove that he has given notice to the plaintiff not to supply the goods to his wife; but it lies on the plaintiff to satisfy the jury, that the defendant's wife contracted the debt by the authority of her husband. (*Spreadbury* v. *Chapman*, E. T. 1838, N. P., 8 C. & P. 371).

‡ An officer in the army, being required to join his regiment in the East Indies, left his wife in England, and settled a certain sum upon her, which was regularly paid:—Held, in an action by a tradesman for goods delivered at the house in which the wife was living, that it was not to be treated as a case of separation, but that the questions for the jury were, 1st, whether the goods supplied were necessaries, considering the condition in life of the husband; 2ndly, whether the sum of money settled was sufficient; and 3rdly, whether it was or was not notorious in the neighbourhood, that the wife was living in a style not justified by her husband; and the jury having found the first question in the negative, and the others in the affirmative, it was held that their verdict must be for the defendant. (*Dennys* v. *Sargeant*, 1834, N. P., 6 C. & P. 419).

and then went to live with her son-in-law, who brought an action against the husband for necessaries.

The Court refused to disturb a verdict for the defendant, on the ground that it was against evidence. The onus of proving that a married woman, living apart from her husband, has the means of supporting herself, is not always cast upon the husband, in resisting a demand for necessaries supplied to her whilst so separated.

to his wife whilst abroad, if the wife has the power of supporting herself*.

3.—*From Adultery**.

4.—*From Violence.*

HOULISTON *v.* SMYTH, E. T. 1825. N. P. 2 *C. & P.* 22; S. C. 3 *Bing.* 127, *questioning* HORWOOD *v.* HOFFER, 3 *Taunt.* 421.

AN action was brought for board and lodging furnished to the defendant's wife. From the evidence adduced for the plaintiff, it appeared that the defendant had been seen in a threatening attitude, holding his fist in his wife's face, and that he had directed a servant to follow her and watch her conduct, he having had her confined in a private madhouse, from which she had been discharged, after an examination before two of the Judges. It was proved, also, that the defendant had said to her, if she did not mind what she was about she should have "mad Moll" to attend her again. In consequence of these things she left the defendant's house and went to the plaintiff's, where she lived for some time.

If a wife apprehend personal violence from her husband, she is justified in leaving him†.

Per Best, C. J.—A man in the plaintiff's situation cannot recover, unless the wife be at his house with the assent of the husband, or unless the husband drives her from home by cruelty, personal violence, or that which shall excite reasonable fear of personal violence; for in such case he sends her out with a general credit. If acts of personal violence had occurred immediately about the time of leaving, though not at the moment, that is ground for presuming that the leaving was on their account.

5.—*Where Alimony decreed.*

WILSON *v.* SMYTH, H. T. 1831. K. B. 1 *B. & Ad.* 801.

IN assumpsit against the husband for necessaries supplied to his wife, it appeared that a suit had been instituted by the wife in the Ecclesiastical Court, and a decree obtained by her for alimony pen-

Where alimony is decreed and regularly paid,

* The husband will not be liable to any extent, if she be living apart in adultery; the verdict, however, in an action for crim. con., being inter alias partes, is not evidence in the action for supplies; and if the husband inform the tradesman that she is living in adultery, he will not be liable beyond necessaries, although he does not prove the adultery. (*Hardie* v. *Grant*, T. T. 1838, N. P., 8 C. & P. 512).

† Where the wife had left the husband in consequence of some violence, and resided, with his knowledge, at the plaintiff's house, and he refused to receive her back unless she would give up certain property:—Held, that being bound to maintain her without any such condition, and having never offered to take her back, he was liable for necessaries. (*Reed* v. *Moore*, 1832, N. P., 5 C. & P. 200).

the husband cannot be sued for necessaries;

dente lite. The husband regularly obeyed the decree. The suit became removed to the Court of Arches, and the decree of the inferior Court could not be enforced, but the wife might have applied to the Arches Court for a fresh decree. She did not, the husband continued to pay, and she to receive the same amount, although there was no existing decree which could bind.

The Court held, that the husband was not liable in an action for necessaries supplied to the wife, while the suit was thus in the Arches Court.

KEEGAN *v.* SMITH, E. T. 1826. K. B. 5 *B. & C.* 375; S. C. 8 *D. & R.* 118.

but the husband is liable for necessaries supplied to wife pending a suit for alimony, until alimony be regularly assigned.

ASSUMPSIT for board, lodging, and necessaries furnished to the defendant's wife. Plea, the general issue. The defendant and his wife were separated under circumstances not necessary to be detailed, but leaving the husband liable to supply her with necessaries. Those for which this action was brought were supplied from the 19th of July to the 8th of November, 1824; but previous to this, viz. in March, 1824, the wife instituted a suit against the husband in the Ecclesiastical Court for a divorce, on the ground of alleged cruelty and adultery.

The Court held, that the husband was liable for necessaries supplied to his wife during the pendency of a suit between them in the Ecclesiastical Court, until alimony has been assigned her; and his liability is not removed by the circumstance, that the alimony, when assigned, is ordered to be reckoned from a time before the supplying of the necessaries in question.

HUNT *v.* DE BLAQUIERE, E. T. 1827. C. P. 5 *Bing.* 550; S. C. 3 *M. & P.* 108.

Where a husband turns his wife out of doors, a decree of alimony, unless duly paid, will not discharge the husband from his liability for necessaries.

IN assumpsit for goods sold, it appeared that the defendant had married Lady Harriet, the daughter of the Marquis Townsend; that he treated her with great cruelty, frequently struck her, and eventually turned her out of his house, and sent her to her mother; that, in the year 1820, the Ecclesiastical Court, at the instance of Lady Harriet, pronounced a decree of divorce a mensâ et thoro, on the ground of adultery on the part of General Blaquiere, and decreed Lady Harriet 330*l.* per annum, payable quarterly, by way of alimony, but it appeared that only 695*l.*, on the whole, had ever been paid of this allowance. The plaintiff's demand was for furniture supplied for a house at Brighton, taken by Lady Harriet. *Best*, C. J., told the jury, that, if a man turned his wife out of doors, or by his cruel conduct forced her to abandon his home and society, he gave her credit wherever she went, and that, notwithstanding the rank of Lady Harriet, she having only an income of 330*l.* per annum, it was for them to say whether the furniture supplied by the plaintiff was necessary and suitable to her situation in life; reserving, for the opinion of the Court, the question whether the decree of alimony operated in discharge of the defendant's liability; and—

The Court held, that, as the alimony was not duly paid, the defendant was still liable.

6.—*Where a Deed of Separation, or Maintenance allowed.*

HINDLEY *v.* LORD WESTMEATH, H. T. 1827. K. B. 6 *B. & C.* 200.

IN an action by a creditor against the husband in respect of a debt contracted by the wife whilst she was living apart from her husband—

The husband is not liable for necessaries if he be responsible under deed to pay trustees a fixed and adequate sum.

The Court said, we do not know that in any case a creditor can avail himself of a deed of separation to sue the husband, nor do we by any means say that he can, if there *be* such a deed, sue the wife. If the husband fail to pay the separate maintenance, the trustees should sue to enforce that payment. If a husband turns away his wife from him, he sends her forth with credit; but where, in opposition to his will, and where he offers to provide for her, she leaves him, then the husband is not liable, and the tradesman trusts her at his peril.

MIZEN *v.* PICK, E. T. 1838. Ex. 3 *M. & W.* 481.

DEBT for board, &c., supplied to the defendant's wife. Plea, nunquam indebitatus, and defence that the wife was living apart from her husband, and that she received from him a sufficient maintenance. The plaintiff, in answer to the defence set up, objected that there was no evidence that he, the plaintiff, had notice of the separate maintenance; but the learned Judge held this to be immaterial; and the jury finding as a fact that the maintenance paid was sufficient, the plaintiff was nonsuited.

So, a husband is not liable for necessaries where the wife has a competent maintenance, whether the tradesman has notice or not.

And the Court refused to interfere.

7.—*Where Husband offers to take his Wife home.*

EMERY *v.* EMERY, T. T. 1827. Ex. 1 *Y. & J.* 501.

IN an action against the husband, it appeared that the defendant, from the time of his marriage, which took place on the 19th of November, 1820, had continually ill-treated his wife, and on one occasion he beat her so brutally, at the same time abusing her, and swearing that he would run her through, that she in consequence left his house that night in a state almost of nudity, and went to the residence of a friend, where she was, by reason of the illtreatment received from her husband, confined to her bed for several days. For five years she resided partly with her friends, and partly at lodgings; she then went to the house of her father, where she remained for fifty-four weeks; and to recover a compensation for her board and lodging during that time the action was brought. It was also proved, that, when the defendant's wife was residing with her father, his brother called and inquired after her, and conveyed the wish of her husband that she should return home.

If a wife be justified in leaving her husband, an offer on his part for her to return does not vary his liabilities as to necessaries supplied to her.

Per Cur.—In the course of the evidence, it was suggested that some attempt had been made on the part of the defendant to procure the return of his wife, which attempt however failed, and the wife continued under the protection of the plaintiff. We take it to be a clear principle of law, that if a husband conducts himself towards his wife with such a degree of misconduct and cruelty as to render it no longer safe for her to remain in his house, she is not to be turned out into the street to starve, or to seek relief in the parish

workhouse, but is justified in having the necessaries of life, suitable to her condition. Such is the effect of the marriage contract, and if the husband by his misconduct forces her to leave his protection, she may seek the means of subsistence elsewhere, and those who, from charity or other motives, are willing to provide them, are entitled to recover a compensation from the husband.

8.—*For Costs incurred by Wife.*

TURNER *v.* ROOKES, E. T. 1839. Q. B. 10 *Ad. & E.* 47; S. C. 2 *P. & D.* 294.

A husband allowed his wife a separate maintenance, his conduct however rendered it necessary for her to exhibit articles of the peace against him:—Held, that the husband was liable for the costs*.

IN an action on an attorney's bill, it appeared that the work and labour done, and for which the defendant was sued, had been done for the plaintiff's wife, in exhibiting articles of the peace against the defendant her husband. It appeared on the plaintiff's evidence, that the husband and wife had been separated for seven years; that the wife had a separate income of 112*l.* a year; and that, at the time when the matters arose for which articles of the peace were exhibited, the defendant had gone to Bath to meet his wife, and to attempt to bring about a reconciliation.

The Court held, that where husband and wife are living apart, and the wife has a separate maintenance, if the husband, by his violence, compels the wife to exhibit articles of the peace against him, he will be liable for the expenses which he has thus rendered necessary for her protection.

LADD *v.* LYNN, H. T. 1837. Ex. 2 *M. & W.* 265.

But, on a separation, he is not liable for the expense of the counterpart obtained by her trustee.

THE defendant having turned his wife out of his house, it was agreed that a deed of separation should be prepared and executed, which was accordingly done.

The Court held, that the husband was not liable to pay the expenses incurred by his wife's trustees in procuring a counterpart to be prepared and executed without an express promise by him to bear that expense.

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9. *If not liable civilly, he is not responsible criminally.*

REX *v.* FLINTON, M. T. 1830. K. B. 1 *B. & Ad.* 227.

When the husband would not be civilly liable for necessaries supplied to his

THE defendant had been convicted by a magistrate as an idle and disorderly person, within the stat. 5 Geo. 4, c. 83, for refusing to maintain his wife, Elizabeth Flinton, though able to maintain her, by reason thereof she became chargeable to the parish. On appeal,

* Assumpsit lies against a husband for the (reasonable) costs of proceedings at law and in equity, instituted by an attorney against him on behalf of his wife, who had been forced to leave his house by extreme ill-treatment, the husband having previously tendered to the plaintiff the rent of a cottage occupied by the wife after her departure, and undertaken to pay the bill of costs, if reasonable. (*Williams* v. *Fowler*, E. T. 1825, Ex., 1 M. & Y. 269). But money lent to the wife or expended at her request, in supporting an indictment against the husband for assaulting her, cannot be recovered in an action against him, such a proceeding not being necessary to her protection; aliter, in the case of exhibiting articles of the peace against him. (*Grendall* v. *Goodmand*, H. T. 1836, K. B., 1 N. & P. 168).

the sessions confirmed the conviction, subject to the opinion of the Court. It appeared that the wife had committed adultery.

wife, he cannot be charged criminally.

Per Cur.—There can be no greater absurdity than that of holding that a man is not actually liable to supply his wife with necessaries on account of her misconduct, and yet that he is criminally liable as a vagrant for not supplying them. The wife, by committing adultery, loses all her rights as a wife, and consequently her husband is not legally bound to maintain her.

III. RELATIVE TO THE RIGHTS AND LIABILITY OF THE WIFE.

(*a*) Rights of the wife.

Oughton *v.* Seppings, T. T. 1830. K. B. 1 *B. & Ad.* 241.

In assumpsit—

A widow may maintain an action against a wrong-doer for a chattel in her possession, though purchased by her during coverture.

The Court held, that where goods had been purchased by the wife in her husband's lifetime, and apparently his property, pass upon his death into the possession of his widow, she is entitled upon her mere possessory right, and without shewing that she is her husband's legal representative, to maintain trespass against a wrong-doer for the taking of the goods; or, if they be sold, she may waive the tort, and maintain assumpsit for the proceeds, without proof of title.

(*b*) Liability of the wife before her husband's death.

1. *In general**.

2. *Where a Divorce*†.

3. *To be arrested or taken in Execution.* See, also, p. 226.

Sparkes *v.* Bell, E. T. 1828. K. B. 8 *B. & C.* 1; S. C. 2 *M. & R.* 124.

A wife in custody for a debt contracted dum sola is not entitled to be discharged on her husband's taking the benefit of the Insolvent Act, if

The defendants were sued to judgment in respect of a debt contracted by the wife while she was sole. They were both in execution, when Mr. Justice *Bayley*, by order, discharged the wife. A rule was obtained, calling on the wife (defendant) to shew cause why that order should not be discharged, and why a new writ of capias ad satisfaciendum should not be issued against him. It appeared that, since the order in question had been made, the defendant had been discharged under the Insolvent Act.

* A warrant of attorney, executed by a feme covert:—Held invalid, although at the time divorced a mensâ et thore. (*Faithorne* v *Blaquiere*, 1818, K. B., 6 M. & S. 73). Where the defendant, a feme covert, having separate property, and living apart from her husband, retained the plaintiffs as her solicitors, and expressly promised to pay them their bills:—Held, that her separate property in the hands of the receiver of the Court was liable. (*Murray* v *Bailee*, 4 Sim. C. C. 82).

† A divorce a mensâ et thoro for adultury does not so far annul the marriage, that she can be sued alone. (*Lewis* v. *Lee*, T. T. 1824, 3 B. & C. 291; S. C. 5 D. & R. 98.)

it appear she have separate property.

Per Bayley, J.—I am not aware upon what grounds I made the order to discharge the wife; but I am satisfied that the order was improperly made. Generally, a wife sued with her husband is liable to be taken in execution, because the judgment survives against her. Where she is taken in execution by collusion between the husband and the creditor, the Court will interfere and discharge her. That is not suggested to be the case here. It seems that she has property; and although, if we had power to judge of the case by motives of compassion, we might relieve her, we are bound to decide by the rules of law.—Rule absolute.

FREAME *v.* MITFORD, M. T. 1832. Ex. 1 *C. & M.* 54; S. C. 3 *Tyrw.* 139.

The Court will not relieve feme covert summarily if there be any doubt as to the marriage, or the credit obtained by deception*.

THE defendant having been arrested as the acceptor of a bill of exchange, and for goods sold and delivered. Rule to shew cause why the bail-bond should not be delivered up to be cancelled on an affidavit stating that the defendant was a married woman at the time of supplying the goods for which the action was brought, and had never since her marriage represented herself as a single woman, either to the plaintiffs or any other person.

Per Cur.—There is a positive affidavit of the defendant's marriage, which is not in any respect put in doubt by the affidavits on the part of the plaintiffs; and it may, therefore, be assumed that the marriage would be proved at the trial, and, if it should, the plaintiffs would ultimately be defeated after incurring all the expense of proceeding to trial. The Court, therefore, ought not, by discharging this rule, to give them any encouragement to go on with the suit, or to expose both parties to the additional and useless expense of putting in and perfecting special bail. We take the rule to be, that if the affidavits raise any degree of doubt as to the coverture, the Court will not interfere in this summary way; but if there be a positive affidavit of the marriage, and no doubt raised on the other side, the Court are bound to consider that there is a marriage. Upon the principle, therefore, that no doubt is raised as to the marriage, and that there was no other deception than what arose from the circumstances in which the defendant was living, this rule ought to be absolute.

(*c*) AFTER HER HUSBAND'S DEATH.

LITTLEFIELD *v.* SHEE, M. T. 1831. K. B. 2 *B. & Ad.* 811.

It seems that a wife is not liable for goods supplied to her before her husband's death,

IN assumpsit against the wife after the death of the husband, for goods sold to her during coverture, whilst he was abroad, she having subsequently promised payment, the declaration merely stating, that, in consideration the plaintiff had at her request supplied her with goods, she promised payment—

* Before the 1 & 2 Vict. c. 110, the Court would discharge a married woman from arrest, unless, at the entering into the contract, she represented herself to be a feme sole. (*Hollingdale* v. *Lloyd*, E. T. 1838, Ex., 6 D. P. C. 565; S. C. 3 M. & W. 416). But the Court refused a motion to discharge a feme coverte in whose name the bill had been drawn. (*Welsh* v. *Gibbs*, H. T. 1836, Ex., 4 D. P. C. 683).

The Court held that amounting to an allegation, that the money was due from the wife, and the proof being of what constituted a debt from the husband, the declaration was not supported by the proof, and that the nonsuit was right. The doctrine, that a moral obligation is a sufficient consideration for a subsequent promise is to be received with some limitation.

when he was abroad.

BLADES *v.* FREE, H. T. 1829. K. B. 9 *B. & C.* 167.

IN an action against an executor—

The Court held, first, where a man has so dealt with a tradesman in respect of goods supplied to his wife, or a woman who passes for his wife, as to be liable for goods supplied to her during his absence, such liability is determined by his death; and his executor is not liable for goods supplied after the fact of his death, though before that fact was known; but there is no objection, in point of law, to the widow entering into an express contract, which will render her liable for goods supplied after the death of the husband, or *apparent* husband.

A contract made by a married woman after the husband's death is not binding upon his estate.

IV. RELATIVE TO DEEDS OF SEPARATION.

WILSON *v.* MUSHETT, T. T. 1832. K. B. 3 *B. & Ad.* 740.

IN debt on a deed of separation, by which the husband engaged to pay an annual sum to his wife upon certain conditions, and which provided that its trusts should continue, although the parties should live together again. On the question whether such clause invalidated the deed—

Per Cur.—It is impossible, in a court of law, to say (consistently with the cases decided in those courts) that this deed was void merely on a reconciliation. As to the trusts of the deed, whether they are such as a court of equity would enforce, that is a question with which we have nothing to do. The provision operates in this way, that, even if they should live together again, the trusts of the deed would still continue. Why it should be held altogether to avoid the instrument in case a reconciliation takes place, it is difficult to say. The provision in its terms is, that the trusts shall go on, whether they live together or not. The wife lives with her husband, and then separates on conditions; but he is to pay the annuity stipulated, although she again live with him.

A clause in a deed, that it shall not be affected by the parties agreeing to live together again and cohabiting, does not render the instrument invalid.

HESSE *v.* ALBERT, M. T. 1828. K. B. 3 *M. & R.* 406.

DECLARATION in covenant on a deed of separation, after reciting an agreement by the husband to allow the wife 250*l.* out of his salary as a searcher, the husband covenanted generally to pay her 250*l.* per annum during her life. Plea, that, after the making of the said indenture, and before the said 15th day of January, 1828, in the said breach of covenant mentioned, and before the said sum of 56*l.* 5*s.* in the said breach of covenant also mentioned, or any part

A covenant by husband to allow wife separate maintenance out of his salary, ceases to be obligatory on his dismissal from office*.

* Where a deed of separation recited, that it had been agreed that the plaintiff should be paid an annual sum out of the personal estate of the wife, and the

thereof became payable, as in the said declaration is supposed, to wit, on the 19th day of November, 1827, to wit, at &c., the said defendant ceased to hold and was deprived of the situation of a searcher in his Majesty's customs, and of the salary belonging to such office, and continually, from the day and year last aforesaid until and at &c., after the commencement of this suit, he the said defendant hath wholly ceased to hold or enjoy such situation, or the salary thereunto attached. On demurrer—

The Court held, that the covenant was controlled by the recital, and that upon his dismissal from the office, not by any act of his own, he was not liable to the covenant.

BAYNON *v.* BATLEY, H. T. 1832. C. P. 8 *Bing.* 256; S. C. 1 *M. & Scott*, 339.

A plea of adultery is no answer to an action for non-payment of maintenance.

To an action of covenant by the plaintiff for non-payment of the wife's separate maintenance, the defendant pleaded, that, after the execution of the indenture, and before the sum claimed became payable, the said Ann Batley, wife of the defendant, had committed adultery with one Alfred Talbois. Demurrer and joinder.

Per Cur.—The defendant, by his plea, admits the execution of indenture, having recognized it by pleading the adultery, "after the making of the said indenture."—Judgment for the plaintiff.

V. RELATIVE TO ACTIONS BY AND AGAINST.

(*a*) PARTIES TO.

1. *Actions by**.

WALLIS *v.* HARRISON, E. T. 1839. Ex. 7 *D. P. C.* 395; S. C. 5 *M. & W.* 142.—S. P. NURSE *v.* WILLS, E. T. 1833. K. B. 1 *N. & M.* 765; S. C. 4 *B. & Ad.* 739.

Husband and wife should join

IT appeared, that the land in question had been demised by the Dean and Chapter of Durham to the plaintiff and his wife for twenty-

defendant covenanted on the behalf of the wife, and by her consent, testified by her being a party thereto, to pay the same out of such personal estate:—Held, that the whole deed being founded on the assumption that there was such personal estate, no express averment was necessary. (*Groome* v. *Debenham*, 1818, K. B., 6 M. & S. 345).

* The wife may sue in the name of lunatic husband. (*Rock* v. *Slade*, M. T. 1838, Ex., 7 Dowl. P. C. 22).

If a wife be living apart from her husband as a servant in the family of A., and so maintaining herself, and she be dismissed from the service by A. in consequence of a letter written by B. reflecting on her character, her husband may maintain an action for special damage. But if A. dismissed her colourably, intending to take her back again, the action will not lie. (*Coward* v. *Wellington*, 1836, N. P., 7 C. & P. 531).

In 1810, the defendant's wife died seised of certain freehold, with which was intermixed certain copyhold, to which she had been admitted in 1804. She left surviving her the defendant and an only daughter, who was shortly after admitted to the copyhold, and married in 1815. The defendant remained in possession of the freehold ever since as tenant by the curtesy, and also of the copyhold ever since, letting them both from time to time together at an entire rent, and never

one years, renewable every seven years, upon payment of a fine. The plaintiff had granted a lease for nine years to the tenant in possession. It was objected, that the action was improperly brought by the plaintiff alone, and that the defendant was entitled to a verdict upon the issue. The learned Judge overruled the objection, and a verdict was found for the plaintiff.

in action for an injury to their reversionary interest in premises leased to them;

The Court held, that, in an action by the husband alone for injury to his reversionary interest, an allegation that the reversion in the said lands belonged to him was supported, and that an objection of the non-joinder of the wife could not be raised without a plea in abatement.

DENGATE *v.* GARDINER, T. T. 1838. Ex. 4 *M. & W.* 5.

CASE for scandalous words, actionable in themselves, spoken of the wife. The declaration stated that the wife got her livelihood by being employed in service, and alleged, as special damage, that, in consequence of the slanderous words, certain persons had refused to employ her. The plaintiff proposed to give evidence of the special damage, which Lord *Abinger*, C. B., refused to admit, as the wife was joined in the action. On motion for a new trial—

but special damage, by loss of the wife's service, can be recovered by the husband alone, and not in joint action.

Per Cur.—The wife's loss is her husband's loss, and special damages cannot be recovered where they unite in the action, under these circumstances. He alone ought to sue for any special damage.

SAVILLE *v.* SWEENEY, H. T. 1833. K. B. 1 *N. & M.* 254.

IN an action for slander by husband and wife, the declaration only alleged that the husband and wife were living separately, and she carrying on the business of keeping a boarding-house; and stated, as special damage, that her friends had not provided her with necessaries, as they before that time had been accustomed to do. It was objected, that the wife should not have been a party to the action. *Parke*, J., told the jury that the wife was properly joined.

So, special damage arising from slanderous words spoken of a separate establishment kept by the wife, will not enable her to join with her husband in the action.

Per Cur.—In point of law, the *cause* of action refers to the husband, and not to the wife. The words are not actionable in themselves, but only upon proof of special damage. We do not say that, under the circumstances stated in the declaration, the husband alone could maintain an action; but we think it quite clear that, upon the facts there stated, the action is not maintainable by the husband and wife jointly. We therefore think that the judgment must be arrested.

recognizing any right in his daughter or her husband to either copyhold or rent. No title was proved, except from the court rolls of the manor. It was insisted that the defendant's possession must be taken to have continued for the protection of his daughter's rights, and that he was therefore her agent for receipt of the rent of the copyhold, liable to an action by her husband to recover it as money had and received to his use:—Held, that the husband could not maintain an action against the defendant without proving such an agency, or some recognition by him of his daughter's right, so as to establish a privity between the plaintiff and defendant, and avoid the question of title, which would otherwise have arisen. (*Clarance* v. *Marshall*, H. T. 1834, Ex., 2 C. & M. 495; S. C. 4 Tyrw. 147).

AYLING *v.* WHICHER, H. T. 1837. K. B. 1 *N. & P.* 416.

Where the right to sue in trover will survive, the husband may sue alone, or jointly with the wife.

UPON a mortgage of chattels to the wife before marriage, it appeared that, upon payment of the principal, at a day not arrived, or at an earlier day, upon notice, and of interest in the meantime, the goods were to remain in the hands of the mortgagor.

The Court held, that the husband might maintain trover for the chattels in his own name, or might join the wife, inasmuch as, in case of his death before the right to obtain possession might accrue, the title would survive to her.

MORGAN *v.* THOMAS, H. T. 1834. Ex. 2 *C. & M.* 388; S. C. 2 *D. P. C.* 332.

Where the wife is separated from her husband, and sued in his name, the Court stayed the proceedings until indemnity given*.

IN an action by husband and wife, in which the husband was joined for conformity, but commenced without the authority of the husband—

The Court stayed the proceedings until he was indemnified for costs, and said, it is the duty of an attorney, obtaining an authority from the husband in such an action, to take care that he has an indemnity; but, before a motion is made to stay proceedings, an indemnity ought to be applied for.

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2. *Actions against.*

VINE *v.* SAUNDERS, M. T. 1837. C. P. 6 *D. P. C.* 233; S. C. 4 *Bing. N. S.* 233; S. C. 3 *Scott*, 359.

Husband and wife may be sued in trespass for a joint tort.

TRESPASS against husband and wife for assault, battery, and false imprisonment, upon a false charge of felony. General demurrer, and joinder. Ground of demurrer, that the action was brought against husband and wife for the trespass of the husband.

The Court held, that a joint action of trespass, for assault and false imprisonment, lies against husband and wife.

(*b*) APPEARANCE†.

(*c*) DECLARATION‡.

BECKETT *v.* DUTTON, M. T. 1840. Ex. 8 *D. P. C.* 865; S. C. 7 *M. & W.* 157.

Declaration against the

ASSUMPSIT on a promissory note. The declaration stated that the defendant, on the 9th of November, 1838, made his promissory

* Where an action is brought (without the authority of the husband) in the name of husband and wife, for an assault upon the latter, the husband will be entitled to stay the procedings until he receives an indemnity against costs. (*Harrison* v. *Almond*, M. T. 1835, B. C., 4 D. P. C. 321).

† In an action against husband and wife for a debt incurred by the wife dum sola, the Court refused, at the instance of the husband, to set aside an appearance entered for both, it appearing that the wife had given instructions to the attorney. If an attorney appears for one without authority, and he applies quickly to the Court, semble, that the Court will interpose to protect him. (*Williams* v. *Smith*, M. T. 1832, Ex., 1 D. P. C., 632).

‡ Where the venue had been changed, in an action by husband and wife, from Middlesex into another county:—Held, that the husband, having since become

note &c., and thereby promised to pay the plaintiffs, on demand, 250*l.* The note produced at the trial was a joint and several promissory note, signed by the defendant and his wife for 250*l.*, dated the 6th of November, 1837, payable twelve months after date, with interest.

The Court held, that the Judge at Nisi Prius was right in allowing the record to be amended, under 3 & 4 Will. 4, c. 42.

husband alone. The note, when produced, appeared to be made jointly and severally by husband and wife. The Judge allowed the amendment*.

SAUNDERSON *v.* GRIFFITHS, T. T. 1826. K. B. 5 *B. & C.* 909; S. C. 8 *D. & R.* 643.

THE declaration in assumpsit by A., his wife, and B., for breaches of an agreement for letting certain premises to defendant, stated the agreement as made by the plaintiffs; but the agreement proved was by an agent, on behalf of the wife of A., and B., of the one part, and the defendant, of the other part. It was objected, that there was a variance between the agreement declared on and the one produced in evidence, the agreement declared on being described as made by the three plaintiffs, and the one given in evidence only purported to be made on behalf of two of the plaintiffs. The plaintiff was nonsuited. On motion to set it aside—

The Court held the variance fatal, the husband not being a party ab initio; and that proof of a subsequent ratification by him, by receipt of rent, was not sufficient, there being a period after the contract, and before the receipt of rent, when he was not bound.

Before the statutes of amendment, a declaration, describing an agreement as made by husband and wife and one A., when only made by agent of the wife and A., was a fatal variance.

HOPKINS *v.* LOGAN, E. T. 1839. Ex. 7 *D. P. C.* 360; S. C. 5 *M. & W.* 241.

IN an action by husband and wife, the declaration stated that, after the intermarriage of the plaintiff, to wit, on the 1st of October, 1838, an account was stated between the husband, on behalf of himself and wife, of the one part, and the defendant, of the other part, concerning monies by the wife, whilst she was sole, lent to the defendant, and remaining unpaid before, and at, and after the time of intermarriage. Upon the account so stated the defendant was found indebted to the plaintiffs in a large sum of money, and, in consideration of the premises, promised to pay the same on the 1st

A declaration, that the debt was due to the wife dum sola, and after marriage there was an account stated with the husband, and a promise to pay him, is bad†.

a barrister, did not give the privilege of bringing it back again, it being confined to the party on whose account the action is brought. (*Newton* v. *Harland*, E. T. 1833, C. P., 4 Bing. N. S. 496; abridged, ante, tit. *Barrister*, Vol. 2, p. 98).

* But where a married woman, whose husband lived abroad, rented premises in her own name, not stating whether she was married or single. Having paid rent to A., of whom she took the premises, under a threat of distress, she was distrained upon by B., claiming to be the landlord, for the same rent. She brought replevin, and the defendant (the broker) pleaded that she was a married woman, and that the goods were her husband's. A Judge at chambers made an order, at the plaintiff's instance, that the proceedings should be amended by inserting the husband's name in the declaration, unless the defendant would withdraw his pleas and avow, in which case the plaintiff's coverture should not be set up:—Held, that such an order could not be made without the defendant's consent, though in a case of obvious oppression, and the Court set aside the order. (*Eubanke* v. *Owen*, T. T. 1836, K. B., 6 N. & M. 799; S. C. 5 Ad. & E. 298; abr., ante, tit. *Amendment*).

† To a declaration in assumpsit for work and labour, against several defendants, charging the promise to have been made by the defendants generally, the defendants pleaded, in abatement, the non-joinder of two others. The Court re-

of October then next ensuing. Plea, that the money in the declaration mentioned was secured to the wife, before her marriage, by bond conditioned for payment on the 10th April, 1840, and that the account was stated concerning the money for which the bond was given, and which was supposed at the time of the account to be due, whereas no part was due; and so the account was stated erroneously.

The Court held that the declaration was bad, 1st, on the ground that the promise alleged was different from that implied by law; 2nd, that it did not appear that the debt was due at the time the account was stated.

(*d*) PLEAS.

JONES *v.* SMITH, E. T. 1838. Ex. 6 *D. P. C.* 557; S. C. 3 *M. & W.* 526.

The 3 & 4 Will. 4, c. 42, s. 8, does not apply to a plea of coverture*.

THE defendant was sued as a feme sole. Having pleaded a plea of coverture in abatement, which did not comply with the requisites of the stat. 3 & 4 Will. 4, c. 42, s. 8, the plaintiff signed judgment.

Per Cur.—The statute applies only to pleas in abatement for non-joinder of co-contractors. That may be gathered from section 8, taken in conjunction with sections 9 and 10; which latter sections seem to limit the operation of the former to those cases in which the plea is not necessarily a termination of the action.

STORR *v.* LEE AND WIFE, H. T. 1839. Q. B. 9 *Ad. & E.* 868; S. C. 1 *P. & D.* 633.

A plea, that the wife took the benefit of the Insolvent Act before coverture, for a debt dum sola, may be pleaded to an action against husband and wife.

To an action for goods sold and delivered to the defendant, Ellen Jane, before her marriage, plea—the defendants say, that whilst the defendant, Ellen Jane, was sole and unmarried, she was duly discharged, according to the Act for the Relief of Insolvent Debtors (7 Geo. 4, c. 57) of and from all the debts and causes of action in the declaration mentioned. Demurrer and joinder.

Per Cur.—The defendants must have judgment. The Legislature intended to free the person of the insolvent entirely from all those debts upon which the discharge can operate. The female defendant has been discharged; and if she be now suable, the object of the Legislature will be defeated. Why should she be liable, by her marriage, to an action from which she was protected while she was unmarried?

fused to arrest the judgment, on the ground that one of the defendants was a feme covert, sued jointly with her husband, and the declaration did not state that the promise was made by her before the marriage, the ambiguity in the declaration being aided by the plea. (*France* v. *White*, 1 Scott, N. S. 604).

* Quære, whether, under the plea of non assumpsit, coverture existing at the time of the contract can be set up since the new rule of pleading, Reg. Gen., H. T. 4 Will. 4. (*Moss* v. *Smith*, 1 M. & G. 228).

Where the defendant held herself out as a widow, and obtained credit with the plaintiff, the Court refused to relieve her, but left her to plead the coverture, although it was not sworn by the plaintiff he was ignorant of it. (*Hall* v. *Barber*, M. T. 1830, B. C., 1 D. P. C. 8).

To assumpsit for work done and attendance given, by the wife of the plaintiff for the defendants, the latter pleaded payment to the wife, without averring that she had authority to receive it:—Held bad on special demurrer. (*Offley* v. *Clay*, 2 Scott, N. S. 372, 2 Man. & G. 172).

LOCKWOOD *v.* SALTER, T. T. 1834. K. B. 5 *B. & Ad.* 303.

To a declaration against husband and wife, for a debt due from the wife before coverture, the husband pleaded his discharge under the Insolvent Act.

The Court held the plea an answer to the action.

So, the husband's discharge is a good plea.

WAITE *v.* JONES, E. T. 1835. C. P. 1 *Bing. N. S.* 656; S. C. 1 *Scott*, 730.

IN an action against the defendant for not carrying into effect an agreement, a written memorandum of which he had signed, by which he bound himself to pay certain debts and household expenses, &c., of his wife's, and by which the plaintiff's time of quitting a certain house was to be extended, and the plaintiff was to execute a deed of separation between him and his wife. Plea, that there was no consideration for the promise, because the defendant was solely liable. On demurrer—

The Court held the plea bad; that the declaration reciting such memorandum of agreement, and referring to such deed of separation, was good, as nothing appeared on the record to shew that the present or future separation of husband and wife was the consideration of such agreement, or that the motives by which the plaintiff was influenced were vicious or improper.

On a deed of separation, the husband undertook to pay certain debts. Plea, no consideration, because he was solely liable:—Held bad*.

(*e*) REPLICATIONS.

STRETTON *v.* BUSNACH, T. T. 1834. C. P. 1 *Bing. N. S.* 139; S. C. 4 *M. & Scott*, 678.

To a plea of coverture the plaintiff replied that the husband of defendant was an alien; that he was not in England at the time of entering into the contract on which the action was brought, nor since; that the plaintiff did not give him credit, and that he dealt with defendant as a feme sole.

The Court held the replication to be bad, and that defendant was entitled to judgment; they, however, gave leave to amend on payment of costs.

To a plea of coverture, the plaintiff cannot reply that her husband is an alien abroad, and that she is living as a single woman,

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WILLIAMSON *v.* DAWES, M. T. 1832. C. P. 9 *Bing.* 292; S. C. 2 *M. & Scott*, 352.

To a declaration in assumpsit against a married woman, in which she was sued as a feme sole, she pleaded coverture; and the plaintiffs, in their replication, alleged that, before the cause of action accrued, the defendant's husband became bankrupt, and departed the realm without appearing under his commission, and continued to reside in foreign parts.

The Court held, that such replication was ill; for that, besides not containing any express averment that the defendant's promise was made during her husband's absence, nor any allegation equiva-

nor the absence of the husband under a charge of absconding from a fiat in bankruptcy.

* So, in an action of assumpsit for wrongfully discharging the plaintiff and his wife from the service of the defendant, into which they had entered as dyers, the defendant pleaded in justification, that the wife of the plaintiff "obstinately refused to work for the defendant, in the capacity agreed on:"—Held bad on general demurrer. (*Jacquot* v. *Bourra*, E. T. 1839, Ex., 7 D. P. C. 348).

lent thereto, it did not state such an involuntary absence of the husband as could communicate to the wife the privileges, or affect her with the liabilities, of a feme sole.

MEYER *v.* HAWORTH, T. T. 1838. Q. B. 3 *N. & P.* 462.

So, to a plea of coverture, the plaintiff cannot reply adultery without his knowledge, and that he thought her a feme sole, and that she promised to pay after her husband's death.

THIS was an action of assumpsit for goods sold and delivered, goods bargained and sold, work and labour, money paid and interest, and on an account stated. Plea, coverture. Replication, that the defendant, at the time when the debt was contracted, was living in adultery apart from her husband; that the plaintiff did not know that, but dealt with her as a feme sole; that, after the death of her husband, in consideration of the premises, she promised to pay the plaintiff's demand. On demurrer—

Per Cur.—If there is any moral obligation which could have supported this promise, it ought to have been stated in the declaration; for this replication is a departure. It cannot be available where the original promise is void. If there be a voidable contract only, as in the case of an infant, it may be ratified; but here it is shewn that the original contract was void.—Judgment for the defendant.

(*f*) EVIDENCE*.

ATTORNEY-GENERAL *v.* GOOD, E. T. 1825. Ex. 1 *M. & Y.* 286.

On a mere question of denial as to a party being at home, what the wife says is evidence†.

ON an information, it appeared that a custom-house officer went to search for concealed goods. Having arrived at defendant's house at about seven o'clock, his wife opened the door, and being asked if her husband was at home, answered contrary to the fact, that "he was gone into the country." The officers discovered nine half-ankers of foreign spirits in the privy, having in the meantime heard voices in the house, one of which they judged to be the defendant's. On their return to the house, the defendant came out from it, and being questioned as to his knowledge of the things, shook his head, and said, six or seven times, "It was a bad job." It was objected, that the answer of the wife was inadmissible as evidence against the husband; but the Chief Baron overruled the objection.

Per Cur.—A search was to be made in the house of A. B. for goods supposed to be there in violation of the revenue laws. Before forcing open the door, a peaceable application for admittance was necessary. The door was opened by a person supposed to be A. B.'s wife; and she says that A. B. was not at home, although, in fact, he was. Is not that statement also a part of the res gestæ as much as any other, not as necessarily conclusive against A. B., that he gave a direction to be denied, but as one of the circumstances of the transaction of making the search,—as an ingredient, amongst other facts, from which the jury were to form their verdict, and to infer that he had a guilty knowledge?

* In an action against husband and wife for a debt due from the wife before coverture, it is not necessary to give actual proof of the marriage, presumptive evidence of it is sufficient. (*Tracey* v. *M'Arlton*, H. T. 1839, B. C., 7 D. P. C. 532).

† Admissions in a joint answer by husband and wife:—Held to be no evidence against the wife, but as the answer of the husband alone. (*Elston* v. *Wood*, Chancery, 2 M. & K. 678).

BARDEN *v.* DE KEVERBURG, H. T. 1837. Ex. 2 *M. & W.* 61.

IN an action for goods sold, defendant pleaded coverture; replication, that the husband was an alien, and never within the kingdom, and that the promises were made and cause of action accrued whilst the defendant was living separate, and that she contracted and promised as a feme sole; rejoinder traversing each of these facts—

On an issue of coverture, representations made to other tradespeople are not evidence*.

The Court held, that on such issues the plaintiff was bound to prove that the defendant represented herself to be a feme sole to the plaintiff, or that he dealt with her believing her to be such; and that her dealings with other persons, and representations that she was a feme sole, were inadmissible, unless so made as to come to the plaintiff's knowledge.

(*g*) WITNESSES†.

WELLS *v.* FLETCHER, T. T. 1831. N. P. 5 *C. & P.* 12; S. C. 2 *M. & M.* 99.

A WITNESS for the defendant, on the voir dire, admitted that she had been married to the plaintiff—

If a witness states she is married to the plaintiff, she may be examined so as to shew the marriage void in order to make her a witness‡.

Patteson, J., held that she might also be examined as to facts shewing the marriage a nullity, without producing the proceeding for divorce, as that she had been before married, and supposing, after thirty years' absence, her husband dead, she had married the plaintiff, but that subsequently her former husband had returned; held also, that the connexion being shewn to be dissolved, she might prove the declarations of the plaintiff whilst living as husband and wife.

MATTHEWS *v.* GALINDO, T. T. 1827. C. P. 4 *Bing.* 610.

IN an action against the defendant, a female, supposed to be his wife, was called as a witness.

A woman cohabiting with a person may be a witness; to exclude her, she must be a wife de jure.

The Court held, the mere circumstance of a woman cohabiting with a party, though it goes to her credit, is no ground for rejecting her testimony, in an action to which he is a party, and it is immaterial as to the character in which she stands when the declarations are made; the true principle is, that she shall not be excluded unless de jure wife of the party.

* On issue taken on a plea of coverture, it is no proof of the husband being alive at a particular time, that a letter in his handwriting bears a foreign postmark of a certain date; but if it be proved, in addition, that a witness, shortly before the date of the postmark, wrote to him, and received this letter, which is in answer to that written by the witness, that will be sufficient. (*Reed* v. *Norman*, 1837, N. P., 8 Car. & P. 65).

† Neither husband nor wife can be examined for the purpose of proving non-access during marriage; nor can either be examined as to any collateral fact, for the purpose of proving non-access, as that the husband at a particular time lived at a distance from his wife, and cohabited with another woman. (*Rex* v. *Inhabitants of Sondon*, 5 A. & E. 180).

‡ The defendant's wife cannot be examined for the plaintiff without the defendant's consent, although the marriage has taken place since she was subpœnaed. (*Pedley* v. *Wellesley*, 1828, N. P., 3 C. & P. 558).

(*h*) JUDGMENT.

STAPLES *v.* PURSER, M. T. 1833. C. P. 2 *D. P. C.* 764; S. C. 3 *M. & Scott*, 800.—S. P. HIGGINBOTHAM *v.* HIGGINBOTHAM, M. T. 1839. B. C. 8 *D. P. C.* 126.

On a warrant given by a wife dum sola, judgment may be entered against both*.

MOTION to enter up judgment on an old warrant of attorney against husband and wife. It had been given by the latter previous to her coverture.

The Court gran ted the rule.

(*i*) COSTS.

MUMMERY *v.* CAMPBELL, E. T. 1834. C. P. 2 *D. P. C.* 798; S. C. 10 *Bing.* 511; S. C. 4 *M. & Scott*, 379.

The costs of a motion to discharge a *feme covert* out of custody are not costs in the cause.

ON a rule calling on the prothonotary to review his taxation of costs, it appeared the defendant, a married woman, being arrested, was on motion ordered to be discharged; in making the order, the Court said nothing as to the costs of the motion. Upon discontinuance by the plaintiff, and the prothonotary refusing to tax the defendant the costs of her application, to be discharged as costs in the cause—

The Court held, that the taxing officer was right, and that the party was not entitled to such costs.

(*j*) EXECUTION. See also, ante, p. 215.

EVANS *v.* CHESTER, M. T. 1837. Ex. 6 *D. P. C.* 140; S. C. 2 *M. & W.* 847.

To discharge the wife out of custody for a debt before marriage, it must be sworn that she has no separate property;

THE plaintiff sued a feme sole. She married before declaration, and was afterwards proceeded against to final judgment, and thereupon taken in execution; on an affidavit for her discharge, which stated that no settlement was made on her marriage—

Per Cur.—The husband must be left to his writ of error. If both had been sued in this action, and execution had issued against both, she would not have been entitled to her discharge on this affidavit, as she does not swear she has no separate property, but only that no settlement was made on her marriage. The affidavit is defective in this respect, and the rule must be discharged with costs.

* Where judgment is signed by mistake against a married woman alone, on a warrant of attorney given by her dum sola, a rule nisi only will be granted for vacating that judgment, and signing another against the husband and wife. (*Power* v. *Fry*, 8 Dowl. P. C. 126). In an action by husband and wife, pending the suit the wife died:—Held that the suit thereby abated, and that defendant could not have judgment as in case of nonsuit; the property not being altered, unless judgment is obtained before the death of the wife. (*Checchi* v. *Powell*, H. T. 1827, K. B., 6 B. & C. 253; abridged ante, tit. *Abatement*).

† In an action of trespass by husband and wife, if a nonsuit takes place, the wife may be taken in execution for the costs if she has separate property. (*Hoad* v. *Matthews*, E. T. 1833, B. C., 2 D. P. C. 149).

MOSES *v.* RICHARDSON, T. T. 1828. K. B. 8 *B. & C.* 421.

THE defendant was a married woman, and this was known to the plaintiff when he gave her credit; she had been sued in the action as a feme sole, had suffered judgment by default, and had been charged in execution. Rule to shew cause why she should not be discharged out of custody. or a writ of error must be brought.

Lord *Tenterden*.—We never interfere when the proceedings have gone so far. You let the plaintiff incur all the expense; you then seek to make it fruitless; and you ask the assistance of the Court to save you from expense. Bring your writ of error.—Rule refused.

DEAN *v.* BROWN, E. T. 1826. K. B. 5 *B. & C.* 336; S. C. 8 *D. & R.* 95; S. C. 2 *C. & P.* 62.

A FI. FA. issued against the husband. It appeared that his wife, before her marriage, carried on trade, and being lame kept a horse and gig for the purpose of going round to her customers. In contemplation of marriage, she, by deed, conveyed to a trustee all her household furniture, goods, and chattels, enumerated in a schedule, and the stock in trade, materials, and other articles then belonging to her in and about her said business. The horse and gig were not included in the schedule, but after her marriage were used by her as before. In an action against the sheriff for taking the horse and gig under an execution against the husband, the jury found that, at the time when the deed was executed, the horse and gig belonged to the woman "in and about her business." Property settled on the wife cannot be taken in execution against the husband*.

The Court held, that it was the property of the trustee.

VI. RELATIVE TO ATTACHMENTS†.

VII. RELATIVE TO INDICTMENTS‡.

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* But the property in wearing apparel, bought for herself by a wife living with her husband out of money settled to her separate use before marriage, and paid to her by the trustees, vests by law in the husband, and it is liable to be taken in execution for his debts. (*Carne* v. *Brice*, 7 M. & W. 183; 8 Dowl. P. C. 884).

† Although husband and wife may be parties to a suit, an attachment for non-payment of costs will not be granted against the latter. (*Doe* d. *Allanson* v. *Canfield*, E. T. 1838, B. C., 6 Dowl. P. C. 523).

‡ Where the prisoner was described in the indictment as a single woman, but had been stated by all the witnesses as the wife of the other prisoner, and passed and appeared as such; if the jury were satisfied that she was so in fact, the jury ought to acquit, notwithstanding she had pleaded to the indictment. (*Reg.* v. *Woodward*, 1838, N. P., 8 C. & P. 561).

If a man and woman be jointly indicted for a larceny, the latter as a single woman, it is not sufficient to entitle her to an acquittal on the ground of a coercion to prove both jointly committed the offence, and that she had lived with the man for two years, and was reputed his wife; but such evidence must be given as to satisfy the jury that the prisoners are in fact married persons, although it is not absolutely necessary to prove the actual marriage of the parties. (*Rex* v. *Hassall*, 1826, N. P., 2 C. & P. 434).

A man was indicted for shooting at his wife with intent to murder her, &c.

Hustings. See tits. *Election—Parliament.*

Identity. See. tit. *Evidence.*

Idiot. See tit. *Lunatic.*

Imparlance*.

WHALLEY *v.* BARNET, M. T. 1832. Ex. 1 *D. P. C.* 607; S. C. 3 *Tyrw.* 239.

If the writ and appearance are of one term, and the decla-

THE defendant, having received notice in the vacation of the execution of a writ of inquiry, took out a summons to set aside proceedings, on the ground that he had claimed and was entitled to

Previous to the commencement of his trial, he applied to the Judge to know whether his wife was to be produced as a witness for the prosecution, stating that her presence was necessary for his interests. The counsel for the prosecution stated that he should not call her; and the Judge told the prisoner, that although she was a competent witness against him, yet her presence was not indispensable. The prisoner was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the Judge to suggest questions to be put by his Lordship to the witnesses for the prosecution to negative the supposition that he was insane; and his Lordship also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in shewing that the defence was an incorrect one, and, on the contrary, their evidence tended to establish it more clearly; and the prisoner was acquitted on the ground of insanity. (*Reg.* v. *Pearce*, 1840, C. C. C., 9 C. & P. 667).

* After declaration, and before issue joined, the proceedings were continued by imparlance; after issue joined and before verdict by vicecomes non misit breve; and after verdict or demurrer, by curia advisari vult. But the doctrine as to imparling from term to term seems entirely abolished by 11th sect. 2 Will. 4, c. 39; that clause of the act making the whole year, with a special exception, as equivalent to term time. It has, however, been intimated as probable, that some of the consequences of the doctrine of imparlance may still be found applicable to pleas to the jurisdiction or claims of cognizance, &c. &c., and the framers of the rule, H. T. 4 Will. 4, seems to have contemplated its continued operation; for, after ordering that no entry of continuance, by way of imparlance, curia advisari vult, vicecomes non misit breve, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the jurata ponitur in respectu, which is to be retained: provided, that such regulation shall not alter or affect any existing rules of practice, as to the times of proceedings in the cause, by R. H. T. 2 Will. 4, s. 45, it is ordered, "That if the declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant may plead as of the preceding term, within four days of the next term, any plea to the jurisdiction, in abatement, or a tender, or any other similar plea." The R. H. T. 2 W. 4, abolishes the practice of having a distinct imparlance roll, which was formerly required in some cases. In one case it was declared that, where a plaintiff declares in vacation, the defendant is entitled to an imparlance, notwithstanding the 2 & 3 Will. 4, c. 39, s. 11, and 2 Reg. Gen. H. T. 4 Will. 4, (Pleading Rules). (*Frean* v. *Chaplin*, E. T. 1834, B. C., 2 D. P. C. 523). But in a subsequent case imparlance held to be abolished since the late rules. (*Wigley* v. *Tomlins*, M. T. 1834, B. C., 3 D. P. C. 7; overruling *Frean* v. *Chaplin*, 2 Dowl. P. C. 523).

an imparlance. The writ and appearance was of Hilary, and the declaration of Trinity Term; but *Vaughan*, B., before whom the parties attended, decided that the defendant was not entitled to an imparlance. It was arranged between the parties attending the summons, that the execution of the writ of inquiry should be stayed, in order to give the defendant time to decide whether he would consent to certain terms proposed. The defendant refused to accede to the terms, and obtained a rule to set aside the judgment and subsequent proceedings for irregularity.

ration of another, the defendant is still entitled to an imparlance, notwithstanding the Rule of T. T. 1 W. 4.

Lord *Lyndhurst*, C. B.—There was clearly an irregularity in signing this judgment; and what the defendant did after *Vaughan*, B., had decided that the judgment was not irregular, cannot be deemed a waiver, because it was occasioned by that decision. The defendant was entitled to an imparlance.—Rule absolute.

COOK *v.* ALLEN, H. T. 1833. Ex. 1 *C. & M.* 350; S. C. 1 *D. P. C.* 676.

ON the 2nd of May, a writ of quo minus, returnable on the 3rd, was served on the defendant; but in consequence of negotiations between the parties, no further proceedings were taken until the 2nd day of Michaelmas Term, when the plaintiff entered a common appearance, pursuant to the statute 12 Geo. 1, c. 29. On the 20th of November a declaration was filed, and notice thereof given, and on the 22nd a rule to plead in eight days. Interlocutory judgment was signed on the 1st of December, and after due notice to tax costs, final judgment was signed, and execution issued on the 13th of December. On the 17th a summons, to set aside proceedings, was taken out before *Bolland*, B., on the ground that the appearance was entered too late, and also that the defendant was entitled to an imparlance to Hilary Term. The Baron, considering the questions proper to be referred to the Court, refused to interfere—

The plaintiff had four terms to file common bail, and the defendant was not entitled to an imparlance until he had appeared.

The Court held, 1st, that the plaintiff may enter a common appearance at any time before the cause is out of Court, and therefore he has four terms for that purpose; and, 2ndly, that a defendant, who has not appeared, has no right to an imparlance.

Imprisonment.

I. RELATIVE TO WHAT AMOUNTS TO, AND WHEN AN ACTION FOR FALSE IMPRISONMENT CAN OR CANNOT BE MAINTAINED, p. 230.

II. RELATIVE TO THE PERSONS LIABLE FOR, p. 232.

III. RELATIVE TO THE FORM OF ACTION, p. 233.

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V. RELATIVE TO THE PLEAS.

(*a*) IN GENERAL, p. 234.

V. RELATIVE TO THE PLEAS—*continued.*

(*b*) IN PARTICULAR.

1. *Accord and Satisfaction*, p. 235.
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VIII. RELATIVE TO THE COSTS. p. 239.

I. RELATIVE TO WHAT AMOUNTS TO, AND WHEN AN ACTION FOR FALSE IMPRISONMENT CAN OR CANNOT BE MAINTAINED.

HALL *v.* BOOTH, E. T. 1834. K. B. 3 *N. & M.* 316.

Forcibly to take a party to a place where a felony has been committed, to ascertain if he be the felon, is an imprisonment*.

TRESPASS for false imprisonment. Plea justifying the compelling the plaintiff to go to a certain pawnbroker's shop, because a certain gun had been stolen, wherefore he, the defendant, having reasonable and probable cause for suspecting, and actually suspecting the plaintiff to have been guilty of and concerned in the felonious stealing, taking, and carrying away of the said gun, did at the time when &c. in the declaration mentioned, with the assistance of a certain policeman, gently lay hands on the said plaintiff, and assaulted him, the plaintiff, and seized and laid hold of him, in order to carry and convey, and did carry and convey him, the plaintiff, to the said pawnbroker's shop, in the declaration mentioned, for the purpose of ascertaining if the plaintiff was the person who had pawned the gun as aforesaid. General demurrer and joinder.

Per Cur.—Leave to amend upon payment of costs.

* An innkeeper, by detaining the carriage of his guest, and thus preventing him from proceeding on his journey, is not guilty of an imprisonment. (*Gordon* v. *Cox*, 1835, N. P., 7 C. & P. 172.) And where a man and his wife refused to go out of the shop of a baker, and continued to abuse him in relation to an alleged overcharge, until a crowd of 100 or 150 persons collected round the shop, and obstructed the public passage:—Held, that the baker was justified in giving the man and his wife into custody; and that their conduct amounted to a breach of the peace, and that trespass would not lie. (*Cohen* v. *Huskisson*, E. T. 1837, Ex., 2 M. & W. 477). But where the defendant, an ostler, charged the plaintiff, a cab-driver, with having cruelly ill-used the horse, and gave him in charge to a police-officer:—Held liable for the false imprisonment, as not being the owner of the horse, nor having seen the alleged cruel treatment, he had no right to give him in charge, nor would the officer on such a statement have been justified in taking the party into custody of his own authority; held also, that the defendant, having no right to apprehend, was not entitled to any notice of action. (*Hopkins* v. *Crowe*, M. T. 1835, N. P., 7 C. & P. 373). So, trespass against a gaol-keeper for false imprisonment:—Held to lie where the defendants, being prisoners, were removed without a habeas corpus, to be present at the trial of other prisoners. (*Bint* v. *Lavender*, 1825, N. P., 1 C. & P. 659). And where the plaintiff went without compulsion, with a constable, who was directed by the defendant to take him into custody, on a charge of felony:—Held, that it was a sufficient imprisonment, and therefore including an assault. (*Pocock* v. *Moore*, M. T. 1825, N. P., 1 Ry. & M. 321). And if a constable tell a person given into his charge that he must go with him before a magistrate, and such person in consequence goes quietly, without any force being used by that constable, it is a sufficient imprisonment to support an action of trespass. (*Chinn* v. *Morris*, T. T. 1826, N. P., 2 C. & P. 361).

FOX *v.* GAUNT, T. T. 1832. K. B. 3 *B. & Ad.* 798.

So, a private person cannot justify giving a party in charge for a misdemeanor without a justice's warrant*;

THIS was an action of trespass, assault, and false imprisonment, in taking the plaintiff to a police-office. The defendant pleaded the general issue, and several pleas of justification. It was contended that the facts disclosed in the plea amounted to a felony, or at least to a misdemeanor of that character which would justify apprehending the plaintiff upon reasonable suspicion that he was the person.

Lord *Tenterden*, C. J.—It cannot be maintained that the facts amounted to a felony; and there is no authority for saying that there is any distinction between one kind of misdemeanor and another.

HUMPHREY *v.* MITCHELL, E. T. 1836. C. P. 2 *Bing. N. S.* 619.

and a creditor having the debtor in custody may nevertheless be sued in trespass for detaining him on an unfounded charge of felony.

IN an action of debt on a bond given by the defendant to the plaintiffs, sheriffs of London, as a surety for good conduct in the execution of warrants, &c. It appeared the assistant of a sheriff's officer, acting in conjunction with his principal, who had the warrant, arrested the defendant in an action, and gave him, on a false charge, into the custody of a police-officer, who took him to the police-station, and detained him on the charge which had been given. The assistant returned to his principal, told him what had occurred, and where the defendant was to be found, upon which the bailiff repaired to the station-house, executed his warrant, and conveyed the party to the sheriff's prison.

The Court held, that such caption by the bailiff was illegal, as the original removal of the party to the station-house was illegal, it being, in his knowledge, made upon a charge which was false, consequently that the sheriff was liable in damages to the party arrested, and the bailiff's surety liable over to the sheriff.

REDDELL *v.* PAKEMAN, E. T. 1835. Ex. 3 *D. P. C.* 714; S. C. 2 *C., M. & R.* 30.

As long as the writ is in force, though the affidavit of debt be insufficient, an action for false imprisonment will not lie.

AFTER a capias and exigi facias issued, the defendant surrendered himself, and for want of bail was committed to prison. The affidavit of debt was for 20*l.* and upwards on a note, but did not state the amount of the note, and the defendant in the action brought trespass and false imprisonment against the plaintiff in the action.

The Court held, that so long as the writ continued in existence no action would lie, although the party, upon application to the Court, would have been entitled to have been discharged out of custody.

HERRING *v.* BOYLE, T. T. 1834. Ex. 1 *C., M. & R.* 377; S. C. 4 *Tyrw.* 801; S. C. 6 *C. & P.* 496.

A schoolmaster's refusing to allow a parent to see or take away her child

THIS was an action of trespass by an infant, who sued by his guardian, for assault and false imprisonment against a schoolmaster. It appeared, on the 24th of December, the plaintiff's mother went to the school and asked the defendant to take the plaintiff home for the Christmas holidays. The defendant refused, and would not

* Nor for felony, unless a felony has been actually committed. (*Beckwith* v. *Philby*, E. T. 1827, K. B., 6 B. & C. 635; abridged ante, Vol. 3, p. 8).

is not an imprisonment, unless there be evidence of actual restraint.

permit the mother to see her son, and told her that he would not allow him to go home, unless the quarter ending on the 25th were paid. A few days after Christmas-day, the mother again went to the defendant at his school, offered him the money for the quarter up to Christmas, and requested that she might see her son, and take him home. The defendant then said a new quarter had commenced on the 25th, and that he would not let the child go until she had paid him for that quarter, and he refused to let her see the child. A writ of habeas corpus was sued out, and the plaintiff was then delivered up to his mother. It did not appear that the plaintiff knew of what passed between the defendant and his mother, that he expressed any wish to go home, or that an actual restraint was put upon him; and the learned Judge, after communicating with the Judges of this Court, then sitting in banc, expressed his opinion, that there was no evidence of an imprisonment to go to the jury, and directed a nonsuit.

And the Court refused to set the nonsuit aside.

II. RELATIVE TO THE PERSONS LIABLE FOR.

BRIDGETT *v.* COYNEY, M. T. 1827. K. B. 1 *M. & Ry.* 211.

A justice has no right to order a party in custody to be taken out of Court to see if the matter can be arranged*.

IN trespass, it appeared that the plaintiff being taken before the defendant, a magistrate, on a complaint of having killed a dog, and refusing to adopt the recommendation to make terms, was told by the defendant that, unless he paid a certain sum, he should convict him in a penalty for the offence under the Malicious Trespass Act, the plaintiff rejected the proposal, and declared he would carry the case elsewhere, upon which the defendant called in a constable, and ordered him to take the plaintiff out, and if the parties did not settle to bring him in again, and he would proceed to convict him under the act, and the plaintiff accordingly went out with the constable.

The Court held the fact to be sufficient evidence of an imprisonment of the plaintiff by order of the defendant, and nothing to furnish a justification as a ground for disturbing the verdict found by the jury for the plaintiff.

ROGERS *v.* JONES, M. T. 1824. K. B. 3 *B. & C.* 409; S. C. 5 *D. & R.* 268.

If a party be committed by a justice for an offence not punishable, the justice cannot

IN an action against a magistrate for false imprisonment, the plaintiff proved a commitment for a certain alleged offence. The defendant proved a conviction of the plaintiff for an offence different from that recited in the commitment. On the part of the defendant, it was contended that the conviction protected the magistrate;

* The commander of an English merchant ship lying in a port of a foreign state sent a seaman, who had committed mutiny on board the ship, ashore in custody of the soldiers of the port, and procured him to be flogged and imprisoned by the local authorities:—Held, that the captain was answerable in trespass for what was done on shore, he having taken an active part in instigating and promoting the proceedings. (*Aitken* v. *Bedwell*, E. T. 1827, N. P., 1 M. & M. 69).

but the learned Judge was of opinion that the conviction was wrong, and the jury found a verdict for the plaintiff for 23*l.*

In an action produce a conviction for another and different offence*.

Per Cur.—This conviction was made for an offence against the statute of 6 Geo. 3, c. 48, and is evidently bad on the face of it. The statute of 43 Geo. 3 extends only to protect magistrates where the conviction has been quashed. Here the conviction has not been quashed, and therefore this case is not within that statute. There is an act between conviction and commitment, namely, non-payment, before the latter can be made. We see no reason whatever for disturbing the verdict of the jury; besides, the defendant cannot rely on another conviction for a different offence.

III. RELATIVE TO THE FORM OF ACTION.

Bryant *v.* Clutton, E. T. 1836. Ex. 1 *M. & W.* 408.

Trespass lies against a party who causes another, who is in the custody of the Marshal illegally, to be brought up to be committed on an attachment.

Trespass for assaulting and imprisoning the plaintiff in the King's Bench Prison. Pleas, first, not guilty; secondly, a justification under an attachment out of the Court of King's Bench for a contempt in non-payment of costs. Replication, de injuriâ. It appeared that the plaintiff being in the custody of the Marshal of the King's Bench was brought up to that Court by an order obtained by the defendant, and served upon the gaoler by the clerk of the defendant, who was an attorney, and he was committed by the Court to the same custody on an attachment for non-payment of costs, under which attachment he had been detained in prison for four years and a half.

The Court held (dissentiente Lord *Abinger*, C. B.), that an action of trespass was maintainable against the party who delivered the order to the Marshal.

IV. RELATIVE TO THE DECLARATION†.

* In an action by A. against B. for false imprisonment, B. cannot defend himself under a magistrate's warrant against C., although A. was charged with felony before the magistrate, and was the person against whom the warrant was intended to issue. (*Hoye* v. *Bush*, 2 Scott, N. R. 86; 1 M. & G. 775).

† A. caused B. to be taken into custody on suspicion of felony, and taken before a magistrate, who remanded B. for two days, and then discharged him:—Semble, that B., on a declaration for false imprisonment (in the usual form), cannot recover for the two days' imprisonment after the remand. (*Holtum* v. *Lotun*, M. T. 1834, N. P., 6 C. & P. 726).

A declaration which consisted of one count stated an imprisonment of the plaintiff at a shop, and at a station-house, and at a police-office. The only imprisonment was in the shop. The jury found for the plaintiff, and the Lord Chief Justice would not order the verdict to be entered as to part of the count for the plaintiff, and as to the residue for the defendant. (*Myers* v. *Goodchild*, M. T. 1827, N. P., 8 C. & P. 313).

V. RELATIVE TO THE PLEAS.

(*a*) In general*.

CURRIE *v.* ALMOND, H. T. 1839. C. P. 5 *Bing. N. S.* 224.

Several pleas allowed, stating distinct offences, in justification of the apprehension of the plaintiff.

In an action of trespass for false imprisonment, a rule was obtained for leave to plead to several pleas, alleging distinct offences in justification of the apprehension of the plaintiff.

The Court allowed the pleas, the plaintiff refusing to agree that the several subject-matters should be given in evidence under the first plea pleaded.

HEDGES *v.* CHAPMAN, H. T. 1825. C. P. 2 *Bing.* 523.

A plea, justifying on the ground of suspicion, must shew sufficient materials on the face of it to authorize the imprisonment.

To a declaration of trespass against A. and B. for assaulting the plaintiff, and forcing him to go to a police-office, to be examined as a prisoner before a magistrate, on a charge of felony, which was dismissed, A. and B. pleaded a joint plea of justification, that a horse of A. had been, without his knowledge or consent, taken out of his close, and found in the plaintiff's stable, and that A., having reason to suspect that the horse had been feloniously stolen and taken away by the plaintiff, he (A.) requested B., a constable, to retake the horse, and gave charge of the plaintiff to B., for having feloniously taken him, and requested B. to take the plaintiff into custody, and to convey him and the horse before a magistrate, in order that the plaintiff might be dealt with according to law; and that thereupon B., as the constable, and A., in his aid and by his command, attempted to retake the horse, and gently laid their hands on the plaintiff, who resisted them, whereupon they took him into custody, and brought him before a magistrate, where he was examined as to such charge. On demurrer—

The Court held that such plea was bad, as it afforded no ground of justification to A.; and that, being bad as to him, it was bad as to him and B.

REECE *v.* TAYLOR, H. T. 1835. K. B. 4 *N. & M.* 469.

Under plea justifying an imprisonment,

To an action of trespass and false imprisonment, plea, justifying the removal of the defendant from the plaintiff's house, after request to depart, whereupon the plaintiff assaulted the defendant, who then

* Where one of the defendants gave the plaintiff in custody of the other defendant, a constable, on a charge of felony, and assisted in arresting him:—Held, that it afforded no title to an acquittal as to him, on the general issue in trespass, under 7 Jac. 1, c. 5. (*Hough* v. *Marchant*, 1830, N. P., 1 M. & Malk. 510).

In an action for false imprisonment, brought by a master of a man-of-war against his captain, the defendant pleaded two sets of pleas. The first set stated that he imprisoned the plaintiff in order to bring him to a court-martial for disobedience of his orders, quarrelling, &c.; the second set stated that the imprisonment took place in consequence of charges brought against the plaintiff by a superior officer. The sentence of a court-martial, held to investigate the charges, cannot be received as conclusive evidence on this state of the pleadings, but, to make it so, should be pleaded as an estoppel; and it is open to the jury, if they believe that the imprisonment took place on the charges stated in the first set of pleas, to inquire into the truth of those charges, notwithstanding the decision of the court-martial upon them. (*Hannaford* v. *Hunn*, M. T. 1825, N. P., 2 C. & & P. 148).

caused him to be taken to a police-station; replication, de injuria, &c. The defendant failed in proving an assault by the plaintiff.

The Court held that, being a necessary part of the defence, the plaintiff was entitled to damages for the imprisonment, and that the question of excess could not be raised until the allegations in the plea were proved. Upon issue of a son ass. dem., the defendant must establish a commensurate assault.

because the plaintiff assaulted the defendant in his house, and would not depart, the assault must be proved.

(*b*) In particular.

1. *Accord and Satisfaction.*

Price *v.* Severne, H. T. 1831. C. P. 1 *D. P. C.* 215; 7 *Bing.* 402; S. C. 5 *M. & P.* 250.

The plaintiff importuned the defendant for charity, and, refusing to quit the premises when desired, the defendant gave him in charge to a constable, who detained him a night, and on the following morning brought him again to the defendant, who, after some altercation, gave him 2*l.*, and afterwards 2*s.* 6*d.*, with which the defendant went away. In an action for false imprisonment, verdict for plaintiff. On motion for a new trial—

If a party, after being illegally imprisoned, receive a sum of money from the party imprisoning him, and expresses himself satisfied, a plea of accord and satisfaction might be sustained.

Per Cur.—What are the circumstances of this case? The defendant causes the plaintiff to be taken into custody; for that he was undoubtedly liable to an action. He was not, however, further responsible for the handcuffing the plaintiff, which was done without his knowledge. The plaintiff was detained at the inn all night; the next morning he demands money, and two sovereigns are given to him by way of compensation; he then applies for something more for the keep of his horse, and receives half-a-crown more, and departs. Under these circumstances, had the defendant pleaded accord and satisfaction, we think he would have been entitled to a verdict.

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2. *Leave and License*.*

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3. *By Constable†, and under Process.*

Kerbey *v.* Denby, H. T. 1836. Ex. 1 *M. & W.* 336.

In trespass, for breaking dwelling-house, and assaulting and imprisoning, &c.; pleas, 1st, not guilty; 2nd, justification, under a

To justify an arrest under a

* In an action of trespass and false imprisonment for causing a person to be taken to a police-station-house, if it appear that the going proceeded originally from the plaintiff's own wish, the defendant will be entitled to a verdict on either "not guilty," or "leave and license" pleaded; but the plaintiff will not be deprived of his right to recover damages, if it appear that, being acted upon by the defendant's having made a charge of felony against him in the presence of a policeman, he went voluntarily with the policeman to the station-house, for the purpose of meeting the charge. (*Peters* v. *Stanway*, H. T. 1834, N. P., 6 C. & P. 737).

† A constable, by joining with an unprivileged person in a bad plea, will have a verdict against him; although, had he severed in pleading, he might have been entitled to a verdict. (*Hedges* v. *Chapman*, H. T. 1825, C. P., 2 Bing. 523).

ca. sa., it must appear that the outer door was open, or the party will be a trespasser ab initio*.

ca. sa., except as to the breaking, &c., alleging the outer door being open; replication, de injuriâ.

The Court held, that the outer door being open being a condition precedent to the defendant's right to enter and arrest, it was a material averment, and that the plea was sufficiently traversed by the general replication; secondly, it being proved that the defendants broke open the outer door, and so were trespassers ab initio, the Judge properly directed the jury that they might give damages in respect of the whole injury complained of.

M'Crandle *v.* Barwise, H. T. 1830. C. P. 6 *Bing.* 432; S. C. 4 *M. & P.* 120.

Where a wrong party was taken under a ca. sa., and to trespass the defendant pleaded not guilty, and the ca. sa., the Court refused to strike out the last plea.

The defendant was, by mistake, arrested under a ca. sa., as the bail of one E. M., instead of the real bail, a person of the same name. After the defendants (the plaintiff in the original suit, and his attorney) had been informed of their mistake, they still detained the plaintiff in custody for several days. In trespass for the false imprisonment, the defendants pleaded not guilty, and justified under the ca. sa.

The Court refused to strike out the latter plea, though evidently false within the knowledge of the defendants.

VI. RELATIVE TO THE EVIDENCE†.

Holroyd *v.* Doncaster, E. T. 1826. C. P. 3 *Bing.* 492.

Primâ facie, every imprisonment is a tres-

The plaintiff, having been arrested and imprisoned under a magistrate's warrant, brought trespass against the party suing it out for false imprisonment.

* In trespass for imprisoning plaintiff:—Held, that if a plea justifying detention by the defendant (the Marshal of the King's Bench) for chamber rent had been proved, the defendant would have been entitled to a verdict; but the evidence being that rent was demanded in connexion with another claim for fees, &c., the plea failed. (*Stockdale* v. *Chapman*, M. T. 1835, N. P., 7 C. & P. 363).

† In trespass for false imprisonment, proof must be given of circumstances from which the Judge and jury may decide whether there was or was not a detention or restraint of the person; and it is not enough for witnesses to swear that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to shew that the defendant, at a police-office, stood before the plaintiff, and said "You cannot go away till the magistrate comes," if it appears that he relinquished that attitude, and went to another part of the office before the plaintiff had made any attempt to depart. (*Cant* v. *Parsons*, T. T. 1834, N. P., 6 C. & P. 504).

In an action for false imprisonment, the defendant justified on the ground that the plaintiff had been his lodger, and after she had left her apartments, he discovered that some feathers were missing from a bed which she had occupied, and he, suspecting her to be the person that had stolen them, caused her to be apprehended, &c. It appeared that the defendant took a policeman at night to the new lodging of the plaintiff, a few days after she had left his house, and had her apprehended and taken to the station-house, and the next day she was examined before the magistrate and discharged:—Held, that, as the defendant had taken the law into his own hands, and not adopted, as a prudent person would under such circumstances, the cautious course of having a previous investigation by a magistrate, and obtaining a warrant from him, it was incumbent on him to make out to the entire satisfaction of the jury, not only that a felony had been committed, but that the circumstances of the case were such that they, or any reasonable

Per Cur.—When a man is deprived of his liberty, he has his remedy for false imprisonment, unless the party depriving him of it can shew that he was authorized in acting as he did; and the only question here is, by whom the warrant should have been produced—clearly by the party who caused the other to be detained. If a man is arrested, and shews that he has been imprisoned through the means of the defendant, it throws it on him to justify such circumstances.

pass, and a party justifying under a warrant must produce it.

EDGELL *v.* FRANCIS, H. T. 1840. C. P. 1 *Scott, N. S.* 118; S. C. 1 *M. & G.* 222.

THE plaintiff, the secretary of a joint-stock bank in London, with a branch at D., went with the cashier to the latter place with a paper purporting to be an order upon the party having charge of the branch bank to deliver up to them the books and monies in his custody. The defendant, one of the directors of the bank, seeing a light in the banking-house at an unusual hour, went there, and not being satisfied of their authority to act as they were doing, placed the plaintiff and the cashier in the custody of a policeman, who handcuffed them, and put them in the cage for the night. In an action for false imprisonment, evidence that the defendant had, on the following morning, gone to the banking-house in London, broken open the desks of the secretary and cashier, and abstracted papers for the purpose (as was suggested) of depriving them of means of justifying their conduct, was held to have been properly received.

Evidence of facts connected with the cause of imprisonment is admissible*.

REECE *v.* GRIFFITHS, M. T. 1829. K. B. 5 *M. & Ry.* 120.

DECLARATION was in trespass. The first and second counts each charged an assault and false imprisonment of the plaintiff. To each of these counts there was a plea justifying the imprisonment

If the pleadings allege two arrests, and the

person, acting without passion or prejudice, would fairly have suspected the plaintiff of being the person who had committed it. (*Allen* v. *Wright*, 1838, N. P., 8 C. & P. 522).

In trespass and false imprisonment, upon a charge of felony:—Held, that evidence, shewing that the defendant had reasonable grounds of suspicion, was admissible in reduction of damages. (*Chinn* v. *Morris*, T. T. 1826, N. P., 1 Ry. & Moo. 424).

Where, in trespass for false imprisonment, the defendant pleaded that the plaintiff had stolen goods from furnished lodgings, to which the plaintiff replied de injuriâ:—Held, that the plaintiff was entitled to begin; and the felony being jointly charged upon the plaintiff and his son, pawnbrokers' duplicates found on the latter were admissible; and that it was sufficient to support the action if the jury believed a felony to have been committed by the plaintiff alone or jointly. (*Atkinson* v. *Warne*, M. T. 1834, N. P., 6 C. & P. 687).

* If A. imprison B., and, in continuation of that imprisonment, A. deliver B. into the charge of C., who keeps B. in custody, the acts and declarations of C. are evidence against A., in an action for false imprisonment. (*Powell* v. *Hodgetts*, 1826, N. P., 2 C. & P. 432).

Proofs of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear," and putting questions to a speaker, and making observations on his statement, will not justify the chairman of the meeting in giving such person in charge to the police; but, to justify such course of proceeding, it must be shewn that what was done amounted to a breach of the peace. (*Wooding* v. *Oxley*, 1839, N. P., 9 Car. & P. 1).

A. telling a policeman to take charge of B., is the same as *his* telling the policeman to take B. into custody, and is sufficient to support an action for false imprisonment by B. against A. (*Wheeler* v. *Whiting*, 1840, N. P., 9 Car. & P. 262).

first was no actual arrest, and therefore the plaintiff only proves one, he cannot recover.

under a writ against the plaintiff, at the suit of one White, directed to the defendant, the sheriff. It appeared a writ having been issued against the plaintiff at the suit of one White, and the plaintiff coming to the knowledge of it, an arrangement was made by which the parties met, and the plaintiff and his securities executed a bail-bond. No arrest was made, but the officer was paid the usual fee. The plaintiff was afterwards arrested by another officer. The bail-bond remained with the sheriff, as stated in the pleadings. It was stated by the officer, who was called by the plaintiff as a witness, that he had not taken the bail-bond absolutely, but only on condition that it should be approved by the under-sheriff. Upon this, the learned Judge expressed an opinion that the averment in the plaintiff's pleadings respecting the taking of the bail-bond by the sheriff had not been proved, and he nonsuited the plaintiff.

Lord *Tenterden*.—But you are under another difficulty; there had been no arrest when the bail-bond was given; that was given voluntarily. To maintain this action, in its present form, you should shew two arrests.

ATKINSON *v.* WARNE, H. T. 1835. Ex. 1 *C., M. & R.* 827; S. C. 3 *D. P. C.* 483.

But if the defendant's plea alleges two assaults, and he only proves one, he is not bound to prove the other.

IN trespass for false imprisonment, a plea justified two assaults, (the declaration only charging one), and no evidence was given of the second assault mentioned in the plea, and the jury found a verdict for the defendant.

Lord *Abinger*, C. B.—The defendant has justified one assault, and only one assault was proved. The defendant has gone further in his plea than was necessary, (in justifying second assault), and I think it was unnecessary for him to prove that part of the plea. There was but one count for one assault; and, therefore, there could have been no new assignment of another assault, unless the plaintiff admitted the justification as to the assault which the plea applied to.

VII. RELATIVE TO THE DAMAGES*.

PRITCHET *v.* BOEVEY, T. T. 1838. Ex. 1 *C. & M.* 775; S. C. 3 *Tyrw.* 949.

Under the words, the "plaintiff has paid large sums to procure his discharge, &c.," the sums paid

IN an action of trespass for false imprisonment against the defendant, a bailiff, for irregularly arresting the plaintiff, the Judge who discharged the plaintiff at chambers having refused to make any order as to payment of costs—

The Court held, that they might be added to the damages in the action; but that, under an allegation that the plaintiff had been

* If a person be taken by a private individual, without warrant, on suspicion of felony, and will not tell his name, and otherwise conducts himself so as to excite suspicion, this only goes in mitigation of damages, if it turn out that no felony was committed. The stat. 3 Geo. 4, c. 55, s. 21, repealed by the 10 Geo. 4, c. 44, s. 7, which relates to the apprehension of reputed thieves without warrant, only extends to persons generally reputed to be thieves, and not to persons suspected of a particular theft. (*Cowles* v. *Dunbar*, H. T. 1827, N. P., 2 C. & P. 565; S. C. 1 M. & M. 37). See 3 Will. 4, c. 19.

forced and obliged to pay large sums, &c., in procuring his discharge, only such sums could be recovered as had been actually paid by the plaintiff or his attorney.

can only be recovered.

VIII. RELATIVE TO THE COSTS*.

Inclosure†.

See tit. *Poor-Rate.*

I. WITH RESPECT TO THE COMMISSIONERS.

(*a*) Of the appointment of, p. 239.

(*b*) Of the powers of, p. 240.

II. WITH RESPECT TO THE PARTY'S TITLE UNDER, p. 241.

III. WITH RESPECT TO ALLOTMENTS, AND THE CONSTRUCTION OF INCLOSURE ACTS, p. 242.

IV. WITH RESPECT TO STOPPING UP ROADS AND WAYS UNDER, p. 243.

V. WITH RESPECT TO ACTIONS CONNECTED WITH, p. 244.

I. WITH RESPECT TO THE COMMISSIONERS.

(*a*) Of the appointment of.

Doe *d.* Harris *v.* Bodenham, E. T. 1829. K. B. 9*B. & C.* 495.

A commissioner appointed at a meeting, by the major part in value of the proprietors, is sufficient, though the act directed the value to be decided by the assessment of poor rates.

By an inclosure act, authorizing the commissioners to bring ejectment for lands allotted, where the occupiers refused or neglected to pay contributions imposed by them, it being provided that the office of commissioner, when vacant, should be filled by election of the major part, in value, of the proprietors of lands in the parish, present at a public meeting; such value to be ascertained by reference to the last assessment to the poor rates.

The Court held, that an appointment was valid without such reference, where, at the time of the election, all parties present were agreed that there was such majority in point of value.

* Formerly, when the plaintiff recovered less than 40*s.* in trespass for false imprisonment, he was entitled to full costs. (*Booth* v. *Drake*, E. T. 1838, Ex., 6 D. P. C. 564; but see ante, tit. *Costs*).

† See stat. 3 & 4 Will. 4, c. 35, as to rates; 3 & 4 Will. 4, c. 87, as to inrolling the award.

(*b*) Of the powers of.

Doe *d.* Harris *v.* Bodenham, E. T. 1829. K. B. 9 *B. & C.* 495.

The commissioners may make a rate to cover a deficiency, and that before passing their accounts.

By an inclosure act, the expenses were to be defrayed by the sale of part of the lands, and, if any deficiency, then by a contribution of the owners of the allotments:—Held, that the provisions of the general act, s. 29, as to raising such deficiency, applied in the event of any contribution called for not being paid. It was also required, by the local act, that the commissioners should pass their accounts before a justice annually:—Held, that they might still impose a rate to raise such deficiency, without first passing their accounts, the Court suggesting that it would be more convenient that they should pass them antecedently to their estimate of the deficiency.

Goodtitle *d.* Baker *v.* Milburn, M. T. 1837. Ex. 2 *M. & W.* 853.

It will be presumed commissioners act according to their jurisdiction, until the contrary appear.

In 1812, S. P. conveyed two closes of land in the parish of A., by way of mortgage, to W. P. In 1813, an inclosure act was passed for inclosing the waste lands in that parish, by which act the commissioners were empowered to allot any lands within the parish of A., in exchange for any other lands within that parish, provided that all such exchanges were ascertained, specified, and declared in the award of the commissioners, and were made with the consent of the proprietors of the lands exchanged, such consent to be in writing, under their hands &c. By the consent of S. P., the mortgagor, the above two closes of land were exchanged under the act for two other closes; and the commissioners stated, in their award, that the exchange was made with the consent of S. P., the mortgagor, in writing under his hand; but it was stated to have been the consent of the mortgagee.

The Court held, that it was not necessary to say whether the consent of the mortgagee was essential to give validity to the exchange, and that the Court had no right to presume that it was not given, for that the commissioners were not bound to state in the award all the authorities they had; and that the presumption was that they had acted according to their jurisdiction, as the contrary did not appear.

Doe *d.* Lord Suffield *v.* Preston, H. T. 1827. K. B. 7 *B. & C.* 392.

Under an act enabling commissioners to exchange lands or sell them, they may award land partly in exchange and partly for money;

An award of commissioners under an inclosure act, awarding lands partly in exchange for other lands, and partly for a sum of money. On the part of the defendant it was thereupon objected, that the commissioners possessed no power to award lands in exchange for others unless they were of equal value, and that an exchange, partly for land and partly for money, was beyond their jurisdiction.

Per Cur.—The commissioners had power to award land in exchange for other land, or for money paid. Here they had awarded land, partly in exchange for land and partly for money; they have not, therefore, exceeded their jurisdiction.

Earl Falmouth *v.* Richardson, H. T. 1825. K. B. 3 *B. & C.* 837; S. C. 5 *D. & R.* 664.

but commissioners have no

In trespass for distraining the plaintiff's goods, it appeared that a private inclosure act gave the commissioners power to raise money

to pay the expense of carrying into execution that, or the General Inclosure Act.

power, under 41 Geo. 3, to make and levy a rate for making roads; they are only to set them out.

The Court held, that they could not make and levy a rate to pay for making private roads. The 10th section of the General Inclosure Act (41 Geo. 3, c. 109) does not give to commissioners any power to make private roads, but only to set them out, and say in what proportions they shall be made by the owners of allotments.

WINGFIELD *v.* THARP, E. T. 1830. K. B. 10 *B. & C.* 785.

And commissioners, who are allowed to set out allotments in lieu of or in exchange for other lands within the parish, cannot make an allotment in lieu of, and as a compensation for, common rights.

AN inclosure act gave the commissioners a power to exchange, directing the exchange to be ascertained, specified, and declared in their award, the consent to the exchange to be by the parties in writing, and were empowered also to set out, allot, and award any lands, &c., within the parish of A. in lieu of or in exchange for any other lands, &c., within the said parish, provided that all such exchanges should be ascertained, specified, and declared in and by the award to be made by the consent of the owners of the land exchanged. The commissioners awarded a certain allotment to A. B. as a compensation for his open field lands and rights of common and an old inclosure given up by A. B. to be allotted by the commissioners in exchange.

The Court held, that the commissioners had not pursued the powers vested in them by the act, and that A. B. could not make a good title to the allotment.

II. WITH RESPECT TO THE PARTIES' TITLE UNDER.

DOE *d.* NANNEY *v.* GORE, E. T. 1836. Ex. 2 *M. & W.* 320.

The party claiming under an inclosure act must take possession within 20 years.

IN ejectment, it appeared that the lessor of the plaintiff claimed under a conveyance from commissioners of inclosure (not executed according to the power), and the plaintiff never took possession, but the defendant, on a proposal of exchange, had fenced the land, and occupied it for thirty years.

The Court held, that the plaintiff could not recover, but that he was not bound to prove that the commissioners had duly qualified and complied with the requisites of the act before executing the conveyance.

DOE *d.* HARRIS *v.* SAUNDERS, H. T. 1837. K. B. 1 *N. & P.* 119; S. C. 5 *Ad. & E.* 664.

The title runs from the time of the allotment, and not the award.

AN inclosure act provided, that lands awarded and allotted and exchanged should, immediately after such allotment and exchanges made, be and remain and enure to the several allottees to the same uses, estates, &c., as the lands in respect of which the allotments were made were held by.

The Court held, that an allottee became seised immediately after the allotment in point of fact was made, and not when the award was completed.

DOE *v.* EDGAR, H. T. 1836. C. P. 2 *Bing. N. S.* 498; S. C. 2 *Scott*, 732.

After a purchaser of inclosed lands has been in possession twenty years, and paid interest on the purchase-money, he cannot object to the title, on the ground that the Court had not made a formal award.

P. RECEIVED and was admitted into possession of certain allotments of land under an inclosure act. He sold them to G. for a certain sum, before the award was actually made by the commissioners under the act. The vendee entered into possession in July, 1814; he paid but part of the purchase-money at the time, and continued to pay interest upon the remainder to 1826. In an action of ejectment to recover these lands, commenced in October, 1834, by the assignee of the vendor, under the compulsory clauses of the Lord's Act, against the defendant, assignee of the vendee, a bankrupt—

The Court held, that it was not competent to the vendee, nor consequently to the defendant, who stood in the same situation, to object that the vendee was put into possession before the award of the land in question was actually made by the commissioners under the statute.

III. WITH REGARD TO ALLOTMENTS, AND THE CONSTRUCTION OF THE INCLOSURE ACTS.

COX *v.* KING, T. T. 1837. C. P. 3 *Bing. N. S.* 795; S. C. 4 *Scott*, 553.

In a case of exchange, the allotment must expressly state the exchange.

UNDER an inclosure act, the commissioners were empowered to exchange new allotments and old inclosures, so as such exchanges should be ascertained in the award, or some deed executed by the commissioners; and with the consent in writing of the proprietors, the commissioners awarded certain allotments to A. in respect of certain lands, and the lands late A.'s to B., but omitted to say that they were in exchange, but in the conclusion of the award expressed their approbation of the exchange between A. and B.; and there was no consent in writing of A. and B. thereto. The parties remained respectively in possession from the date of the award, in 1798, until the sale of the lands of A., in 1813. On a case for the opinion of the Court—

The Court held, that the vendors could not, under the act and the award, make a good title thereto.

REX *v.* NOCKOLDS, E. T. 1834. K. B. 3 *N. & M.* 334; S. C. 1 *Ad. & E.* 245.

The "thing done" in an inclosure act means the "entry and signing the instrument;" and the time for bringing an action is computed from those acts.

UNDER an inclosure act, the commissioners were authorized, amongst other acts preliminary to the execution of the award, to fix a corn-rent in lieu of tithes, and to direct when it should become payable, and the tithes should be extinguished, which was to be done by some instrument in writing, to be afterwards annexed to the award; the act giving an appeal to any person feeling himself aggrieved by anything done in pursuance of the act within a stated period—

The Court held, that, as to the rent paid in lieu of tithes, by which the rector, the appellant, was aggrieved, the writing and signing the instrument was the thing done on which the cause of complaint arose, and he having special notice could not object that the reference for particulars of the schedule was deposited at a distant place.

CHATFIELD *v.* RUSTON, H. T. 1825. K. B. 3 *B. & C.* 863; S. C. 5 *D. & R.* 675.

THE 49 Geo. 3 (a private inclosure act), reciting that the tithes in the parish should be extinguished, and an adequate compensation should be made to the vicar, enacted that the commissioners should in a certain mode ascertain what yearly sum the tithes were worth, and that there should be issuing and payable to the vicar out of the lands such yearly sum, free and clear of all rates, taxes, and deductions whatsoever.

Allotment to be "free and clear from all rates, taxes, and deductions whatsoever:"—Held, exonerated from poor-rates.

The Court held, that the vicar was not rateable to the poor, in respect of the yearly sum so ascertained and paid to him.

COOPER *v.* WALKER, E. T. 1825. K. B. 4 *B. & C.* 36.

UNDER 2 & 3 Edw. 6, ("An Act for inclosing Lands in the Townships of A., in the Parish of B., and of S. and W."), the commissioners were directed to allot to the rector of W., for glebe, and in lieu of the tithes of the titheable places in the townships of S. and W., so much as should, in quantity, quality, and situation, be equal in value to two fifteenth parts of such titheable places; and to the rector of W. and vicar of B., in lieu of the tithes of a part of the land in the townships of S. and A., to which they were entitled, a like allotment; and the act declared, that, after inrolment of the award, all tithes arising within the inclosed lands should cease, with a saving to all persons &c., (except the persons to whom any allotment should, by virtue of the act, be made, in respect of the interest or property for which such allotments or compensation should be made). The commissioners awarded to the rector of W. certain allotments in W., in lieu of glebe lands in W., and an allotment in S., in lieu of glebe, and a further allotment, more in value than two-fifteenths of the land inclosed in S. and A., but less than two-fifteenths of the land inclosed in S. and W.; and there was not any allotment expressed to be in lieu of the tithes of W., and it appeared that, in fact, the tithes of W. were, at the time of the award, under a composition.

Persons to whom allotments might be, but are not, made, not barred by the statute of their prior rights.

The Court held, that the rector, not having any allotment expressly made in lieu of the tithes in W., was not within the exceptions in the saving clause, and was not bound by the statute.

IV. WITH RESPECT TO STOPPING UP ROADS AND WAYS UNDER.

REX *v.* MARQUIS OF DOWNSHIRE, H. T. 1836. K. B. 6 *N. & M.* 92.

THE act authorized the commissioners to divert and stop up public and private roads, and to prepare and sign a map describing them, and to hold a meeting for hearing objections, in which they were to be assisted by a justice of the division, who, with the commissioners, might alter or confirm the map; and it provided, that all roads not so set out and confirmed should be extinguished; but, by a proviso, no roads passing through old inclosures were to be diverted or stopped up but by an order of justices, under their hands and seals, which was to be subject to appeal.

Where public and private roads are authorized to be diverted and stopped up, and delineated on a map, roads not so mapped are not legally diverted or stopped up.

The Court held, that old roads, not set out and confirmed by the commissioners, but which passed partly through old inclosures and partly over the lands to be inclosed, were not extinguished, by not being set out in the map or award.

REX *v.* THE MARQUIS OF DOWNSHIRE, H. T. 1836. K. B. 6 *N. & M.* 92.

It must appear in the order, that the road was stopped up or diverted on *view* by the justices.

UNDER an inclosure act, an order of two justices for stopping up several highways was in this form:—"Having particularly viewed the public roads and footways &c., and being satisfied that the highways &c., intended to remain and be the public highways &c., in future, are continued, or have been set out and properly formed, and made safe and convenient, &c., and that the roads and footways hereinafter described are unnecessary to be continued &c."

The Court held the order bad, because the justices have no jurisdiction, except upon their own view, and it is perfectly consistent with the terms of the order above set out, that the justices may have been satisfied that the roads and footways were unnecessary, by other means than upon their own view; that "having particularly viewed" could not be considered as applicable to the whole of the subsequent matter contained in the order upon which the justices alleged they were satisfied.

LOGAN *v.* BURTON, E.T. 1826. K. B. 5 *B. & C.* 513; S. C. 8 *D. & R.* 299.

Under the 41 G. 3, c. 109, s. 8, the concurrence of two justices must be had to authorize the stopping up of any way or ways.

A PUBLIC footway passed over a common into and across a farmyard to a public road on the other side of the farmyard. By a local act for inclosing the common, giving powers to divert and stop up roads over it, it was provided that the commissioners should not divert, or turn, or stop up, any old road leading over other parts not to be inclosed, without the concurrence and order of two justices. The commissioners awarded the public footways over both closes to be a private footway.

The Court held, that the old right of public footway remained over both closes, for the concurrence and order of two justices was necessary, under the proviso in 41 Geo. 3, c. 109, (the General Inclosure Act), in order to extinguish the public right over the allotment of common as well as that over the farmyard.

V. WITH REGARD TO ACTIONS CONNECTED WITH.

BAILIFFS, &c. OF GODMANCHESTER *v.* PHILLIPS, M. T. 1833. K. B. 2 *N. & M.* 713; S. C. 5 *B. & Ad.* 198.

The time limited for bringing an action under an inclosure act does not apply to a case not within it.

COMMONABLE rights over certain commons of a manor, of which the corporation of G. were lords, had, prior to an inclosure act, been exercised by such occupiers of commonable messuages or cottages as were freemen; the act authorized the commissioners to allot plots of those commons as a compensation for the rights of common of all the owners, &c., of commonable messuages or cottages, for such messuages, &c., only, such plots to be used as the commis-

sioners should, by their award, direct, and they awarded a certain plot as common of pasture, to the owners, &c., of the said messuages, and only having right of common.

The Court held, that a party, not a freeman, becoming subsequently owner of one of these messuages, could not acquire a right under the award in respect of such messuage, which before the inclosure he would not have had, and that the corporation might maintain trespass, although brought beyond the time limited by the inclosure act for bringing actions after the award, the case not being within the statute.

Indemnity.

REYNOLDS *v.* DOYLE, M. T. 1840. C. P. 2 *Scott, N. S.* 45.

There is an implication in law, that a party who lends his acceptance is to be indemnified*.

THE defendant, on entering the service of a foreign state, obtained from the plaintiff, an agent, the loan of his acceptance, at forty days' date.

The Court held, that the implication in law amounted to an indemnity to the plaintiff, if called on to pay it when due.

BABER *v.* HARRIS, H. T. 1839. K. B. 1 *P. & D.* 360.

There can be no implied contract to indemnify, upon which assumpsit will lie, where there is a covenant under seal.

IN an assignment of a lease, the assignee covenanted for quiet enjoyment. The assignee having entered, the lessor distrained upon his goods for rent previously in arrear from the assignor; and the assignee, to redeem his goods, paid the rent demanded. The assignor subsequently promised to repay the amount, but neglected to do so. In an action of assumpsit for money lent, for money paid for defendant's use, and on an account stated—

Per Cur.—The question in this case was, whether, under the circumstances, an action of covenant could be maintained on the indenture of assignment from the defendant to the plaintiff; for if it could, no action of assumpsit, on an implied promise to indemnify, will lie. It was said, the indenture does not contain any express covenant to indemnify against the rent due to the superior landlord, nor for quiet enjoyment; but if the plaintiff be disturbed in his possession, which he is when distrained on for rent, an action of covenant will lie on the word "grant," in the indenture of assignment.

* And where the indorsee, on the bill being returned dishonoured, promised to indemnify the holder for the costs, if he would sue the acceptor:—Held, that the holder might sue for the costs for which he had become liable to his attorney, although he had not actually paid them. (*Bullock* v. *Lloyd*, M. T. 1825, N. P., 2 C. & P. 119).

If an agreement for letting part of a house, at a rent of 30*l.*, contain a clause that the tenant shall be liable only to the said rent, such clause is a clause of indemnity, and an action will lie upon it, if the tenant's goods are seized under a distress for rent by the original landlord, though the party giving the indemnity be not the immediate tenant of such original landlord; but if no notice be given to the party indemnifying, that he may pay the rent and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts. (*Evans* v. *Curtis*, T. T. 1826, N. P., 2 C. & P., 296).

Before 1 & 2 Vict. c. 110, where the party had been called on to pay arrears of an annuity:—Held, that the defendant might be held to bail in an action on the indemnity bond. (*Anderson* v. *Bell*, T. T. 1832, Ex., 3 Tyrw. 732; S. C. 2 C. & J. 630).

CARR *v.* ROBERTS, T. T. 1833. K. B. 2 *N. & M.* 42; S. C. 5 *B. & Ad.* 78.

There is a breach of a covenant to indemnify as soon as an action is brought for arrears.

BY agreement, the defendant, in consideration of a conveyance of premises, took upon himself the payment of an annuity granted by J. W., and secured by bond, and the debts of J. W., with an express covenant to indemnify and protect J. W., his heirs, executors, &c., against them. The annuity becoming in arrear, the grantee recovered against the plaintiff, the representative of J. W., judgment for the whole penalty, part to be levied of goods in his hands, and the rest of assets quando acciderint.

The Court held, that the plaintiff was entitled to sue for and recover the whole amount, the agreement amounting to a covenant to pay the debt; and that there was sufficient breach of the covenant to indemnify as soon as an action was brought for the arrears.

SMITH *v.* COMPTON, E. T. 1832. K. B. 3 *B. & Ad.* 407.

Under a covenant for good title, the vendee is entitled to compromise the claim of an adverse party really entitled, and to recover costs.

THIS was an action for the breach of covenant of title, alleging, as damage, that the plaintiff was impleaded in a plea of formedon in remainder, by the tenant in remainder, to whom the plaintiff was obliged to pay 850*l.*, in order to complete his title, as well as the costs which the plaintiff had paid to his own attorney, which had been incurred in arranging the action.

The Court held, that, in an action of covenant of title, the plaintiff is entitled to recover a sum paid to the person claiming by way of compromise, as also the costs which he has incurred with his own attorney in settling it.

See 3 *T. R.* 379.

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Indictment.

See 7 Geo. 4, c. 64, and ante, tit. *Central Criminal Court.*

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I. RELATIVE TO THE OFFENCES WHICH ARE OR ARE NOT INDICTABLE.

(*a*) In general*.

Rex *v.* Levy, 1830. N. P. 4 *C. & P.* 241.

A party who requests to have an article returned, or the value paid, cannot indict.

A watch had been delivered voluntarily to the prisoner to repair; instead of repairing the watch, he sold it. The prosecutor insisted that he would have either the watch or the money. The prisoner said he would pay the money the next day. On an indictment for stealing the watch—

The Judge held the offence did not amount to felony; that the prosecutor had made his election; besides the watch had not been obtained by trick or fraud.

II. RELATIVE TO THE PARTIES INDICTABLE†.

(*a*) By order of the judge‡.

* Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of his Majesty's subjects, is bound to have competent skill, and is bound to treat his patients with care, attention, and assiduity; and if a patient dies for want of either, the person may be indicted. (*Rex* v. *Spiller*, 1832, O. B., 5 C. & P. 333; S. P. *Rex* v. *Long*, 1831, O. B., 4 C. & P. 398—423). Where the jury found that the prisoner's intention, ab initio, was to get goods out of the prosecutor's (a tradesman) possession upon a pretended sale, for cash, and then clandestinely removing and converting them to his own use:—Held to be a felonious taking. (*Rex* v. *Campbell*, 1 Moo. C. C. 179). So, where the jury found that the prisoner never intended to pay for oxen which he had bargained for, for ready money, and the owner had not consented to their being taken away. (*Rex* v. *Gilbert*, 1 Moo. C. C. 185; *Rex* v. *Pratt*, Id. 250). A. was indicted for assaulting a policeman in the execution of his duty. It appeared that the policeman had gone into a public-house where the defendant was having high words with the landlady. The defendant tried to go into a room in the house in which a guest was, and the policeman, without being desired to do so, collared him, and prevented him going into the room, and A. struck the policeman, and several blows passed on both sides:—Held, that, if the jury were satisfied that no breach of the peace was likely to be committed by the defendant on the guest in the room, it was no part of the plaintiff's duty to prevent the defendant from entering it; but assuming that to be so, if the defendant used more violence than was necessary to repel the assault committed on him by the policeman, the defendant would be liable to be convicted of a common assault. (*Regina* v. *Mabel*, 1840, N. P., 9 C. & P. 474). On an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault, which is quite distinct from the felony charged; and on such an indictment the prisoner ought only to be convicted of an assault, which is involved in the felony itself. (*Regina* v. *Gutteridge*, 1840, N. P., 9 C. & P., 471; S. P. *Regina* v. *St. George*, 1840, N. P., 9 C. & P. 483).

† A party is not the less indictable because he is a foreigner, and the offence charged is not punishable in his own country. (*Rex* v. *Esop*, 1836, C. C. C., 7 C. & P. 456).

‡ In an action for money had and received, if it appear that the defendant received the money from the plaintiff to carry to a bank, and that, instead of so doing, the defendant kept it, the Judge will leave it to the jury to say, whether the defendant received it with an intent to steal it, and then feloniously converted it: and if the jury find this in the affirmative, the Judge will direct a verdict to be entered for the defendant, and that the defendant shall be tried for the felony on this finding. (*Prosser* v. *Rowe*, 1826, N. P., 2 C. & P. 421).

(*b*) Deaf and dumb*.

(*c*) Insane persons†.

(*d*) Infants‡.

(*e*) When joint and several§.

III. RELATIVE TO THE FORM OF THE INDICTMENT.

(*a*) Venue‖.

Rex *v.* Penpraze, H. T. 1833. K. B. 1 *N. & M.* 312.

Where an indictment is removed by cer-

On a rule to shew cause why a suggestion for the purpose of changing the venue should not be entered upon the record of an indictment for felony, removed into this Court by certiorari. The

* In the case of a prisoner, deaf and dumb, but capable of reading the indictment, and who, by signs, pleaded not guilty, the Judge directed the jury to consider, 1st, whether the prisoner was mute of malice or not; 2ndly, whether he could plead; and, lastly, whether he had sufficient intellect to comprehend the proceedings, and the details of the evidence, so as to make a proper defence; and that it was not enough that he had a general capacity of communicating on ordinary matters. (*Rex* v. *Pritchard*, 1836, N. P., 7 C. & P. 303).

† Where the evidence discloses facts and symptoms of insanity, from religious fanaticism, a medical man may be asked whether the facts proved shewed symptoms of insanity. (*Rex* v. *Serle*, 1830, N. P., 2 M. & M. 75).

‡ Where a child, under ten years of age, was charged with stealing a small quantity of coals, the Judge directed the jury that they must be satisfied that the party at the time of the offence had a guilty knowledge that he or she was doing wrong, which the jury negatived, and acquitted the prisoner. (*Rex* v. *Owen*, 1830, N. P., 4 C. & P. 236).

§ On an indictment charging two with having made a joint corrupt contract, to procure an appointment:—Held, that each might be separately found guilty. (*Rex* v. *Taggart*, H. T. 1824, N. P., 1 C. & P. 201). A. and B. were indicted for larceny, as principals. A. had been sent by his master to deliver goods to C. He only delivered part, and the rest was stolen, and found in the possession of B.:—Held, that it was a question for the jury, whether B. was present at the time when A. separated the portion stolen from the bulk; for that, if he was, both were rightly charged as principals. (*Rex* v. *Butteris*, 1833, N. P., 6 C. & P. 147).

‖ By the stat. 7 Geo. 4, c. 64, s. 12, it is enacted, "That where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties in the same manner as if it had been actually and wholly committed therein."

If any felony (except murder), or any misdemeanor, be begun in some English county and completed abroad, or vice versâ; or is begun on shore and completed on the high seas, or vice versâ; such cases are untouched by this statute. However, the case of a felony committed on the high seas, to which a person is accessory in some English county, and vice versâ, is provided for by the statute 7 Geo. 4, c. 64, s. 9.

At common law, no offence committed in Wales could be tried in England, and was inquirable of before justices or commissioners assigned by the King, in the county of Wales, where the offence was committed; (1 Hale, 150); but now, by the 1 Will. 4, c. 70, s. 19, assizes for the trial of all criminal and civil matters are to be held in Chester and Wales, under and by virtue of the commissions of assize, oyer and terminer, gaol delivery, and other writs and com-

affidavits stated that the object of the prosecution was to try a question between the lessees of the Duchy of Cornwall and the landowners; that there was no pretence for calling this a case of felony; and that an impartial trial of the cause could not be expected in the county.

tiorari, the Court will not, in a case of felony, allow the venue to be changed.

Denman, C. J.—I think we cannot suppose that a jury of twelve indifferent men would be so corrupt as to give an unfair verdict in a case of felony.—Rule refused.

(*b*) Parish*.

(*c*) Names of parties and title†.

missions to be issued in like manner and form, as hath been usual for the counties in England.

By statute 7 Geo. 4, c. 64, s. 20, "No judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of a proper or perfect venue, where the Court shall appear, by the indictment or information, to have had jurisdiction over the offence."

A felony committed within part of a county included within the Municipal Boundary Act is now triable within the new district. (*Rex* v. *Piller*, 1836, N. P., 7 C. & P. 337). Indictment for stealing two horses in Kent; the only evidence of stealing in Kent was, that the constable having taken the prisoner in Surrey, and the prisoner having offered on some pretence to go to a place in Kent, the constable and prisoner rode the horses there, and the prisoner escaped, leaving the horses with the constable:—Held, not sufficient. (*Rex* v. *Simmonds*, 1834, 1 Moody, C. C. 408).

* At the Central Criminal Court, a person was indicted for a burglary in a house, which was stated in the indictment to be "at the parish of W." The prosecutor stated that the correct name of the parish was "St. Mary W." In the stat. 4 & 5 Will. 4, c. 36 (the Central Criminal Court Act), s. 2, this parish is called "the parish of W.:"—Held sufficient. (*Reg.* v. *St. John's*, 1839, C. C. C., 9 C. & P. 40). So, a house is properly described as "in the parish of Birmingham," although for certain ecclesiastical purposes that parish is divided into three divisions, each called a parish. (*Reg.* v. *Howell*, 1839, N. P., 9 C. & P. 437). But where an indictment for larceny had the words "London, to wit," in the margin, and described the prisoner as "late of London," and charged the offence to have been committed in "the parish of St. Mary le Bow," without averring that parish to be in London:—Held bad, and that this was not aided by the stat. 7 Geo. 4, c. 64, s. 20. (*Rex* v. *Hart*, 1833, O. B., 6 C. & P. 123).

† The person charged by the indictment must be described by his Christian and surname, his place of abode or late residence, and his addition of degree or mystery. Whether this description be a correct one or not is immaterial; for, by stat. 7 Geo. 4, c. 64, s. 19, if any objection be made on that ground, "the Court shall forthwith cause the indictment to be amended, and shall call upon the party to plead thereto." But in prosecutions against a parish or township for the non-repair of a highway, or the non-repair of a bridge, the indictment may be against the inhabitants of the parish, township, or county generally, without naming any of them. (2 Hawk. c. 25, s. 18). An illegitimate child, six weeks old, was baptized on a Sunday, and from that day to the following Tuesday was called by its name of baptism, and its mother's surname:—Held to be sufficient evidence to warrant the jury in finding that the deceased was properly described by those names in an indictment for murder. (*Rex* v. *Evans*, 1839, N. P., 8 C. & P. 765). But where the name of the child, only twelve days old, was alleged to be unknown, it appearing not to have been baptized, and the only evidence of a name was of the mother saying, she should have the child named M. A.:—Held, that no name of reputation was thereby acquired, and the conviction proper. (*Rex* v. *Smith*, 1833, 1 Moody, C. C. 402). Where the indictment stated a suit pending in the ecclesiastical court between W. P. and R. M., and the record produced described it as between W. P. and R. M. the elder:—Held,

(*d*) Addition*.

(*e*) Reign of the king†.

(*f*) Place where offence committed‡.

(*g*) Statement of jurors§.

(*h*) Names of witnesses‖.

(*i*) Certainty requisite**.

Wright *v.* Rex, 1834. Ex. Chamber. 3 *N. & M.* 892; S. C. 1 *Ad. & E.* 434.

The words, "there," and "said," in an indictment, must be taken

On an indictment for an encroachment at W., charging that the defendant, on a highway *there*, leading from a public road (stating the termini) to another public road, describing its termini by a certain wall there, extending into the *said* highway, unlawfully &c.

sufficient; (*Rex* v. *Bailey*, 1835, N. P., 7 C. & P. 264); though where the prosecutor, at the time of making his complaint, gave in his name as P., by which he was often familiarly called, but it was proved that his mother (deceased) always called him by the name stated in the indictment:—Held sufficient. (*Rex* v. *Williams*, 1836, N. P., 7 C. & P. 298). So, A. was indicted for stealing the property of Richard P. It appeared that the prosecutor's name was Richard Jeremiah P., but that he was generally known by the name of Richard P.:—Held sufficient. (*Rex* v. ———, 1834, O. B., 6 C. & P. 408). Description of a peer of Ireland by his Christian name, family name, and title:—Held sufficient; and that the insertion of the surname was no variance, as the Court would not intend two to be only his Christian name. (*Rex* v. *Brinklett*, 1828, N. P., 3 C. & P. 416). But describing him as "lord," and not "baron:"—Held insufficient. (*Reg.* v. *Potts*, 1839, N. P., 8 C. & P. 771).

* A variance in the description of a party, although none be necessary, is fatal; as "widow," where the party was a spinster. (*Rex* v. *W. Deeley*, 1831, 1 Moo. C. C. 303). Addition of "servant" not good; but aided by defendant appearing and pleading a bad plea in abatement. (*Rex* v. *Checkets*, 1818, K. B., 6 M. & S. 88. See 2 Inst. 676; 1 Sid. 247).

† Where an indictment for an offence committed in the reign of the late King concluded, "against the peace of the now Queen" &c.:—Held fatal on demurrer, the 7 Geo. 4, c. 64, s. 20, being confined to the cases of objections taken after judgment; and leave to quash, and prefer a new indictment, refused. (*Reg.* v. *Smith*, 1836, N. P., 2 M. & Rob. 109).

‡ Where the indictment charged the prisoner with being in a certain wood, called Old Walk, belonging to and then in the occupation of W.:—Held, that although, if the name of the occupier were stated, it was unnecessary to give the place any name, yet that, having done so, a variance in the name was fatal. (*Rex* v. *Owen*, 1826, 1 Moo. C. C. 118).

§ An indictment commencing, "the jurors *of*," instead of "*for* our lord" &c.:—Held, that no advantage could be taken thereof in arrest of judgment, as the words were not material, and might be omitted altogether, the jurors being those spoken of in the caption. (*Reg.* v. *Turner*, 1836, N. P., 2 Moo. & R. 214).

‖ It is no objection to a witness's name being put on the back of an indictment for murder, that he is the brother of the prisoner; and if he was present at the time the wound was given, and was examined at the inquest, and that not at the instance of the prisoner, it seems that his name should be on the back of the indictment. (*Reg.* v. *Chapman*, 1838, N. P., 8 C. & P. 558).

** An indictment on the stat. 1 Vict. c. 85, s. 2, stated that the prisoner feloniously, and of his malice aforethought, did assault C. H., and did cause unto C. H. "a certain bodily injury, dangerous to the life of her, the said C. H., by then and there feloniously, with his hands and fists, beating and striking the said

The Court held the indictment sufficient, the latter words *there* and *said* being to be taken as referring only to the antecedent which could make it intelligible, and therefore, to the first-mentioned highway, and not to the more immediate antecedent.

as referring to the last intelligible antecedent.

(*j*) Of the Offence*.

PECK *v.* REGINA, H. T. 1839. Q. B. 9 *Ad. & E.* 686; S. C. 1 *P. & D.* 508.

AN indictment charged a conspiring to defraud divers of her Majesty's liege subjects, who should deal &c. with the defendants; and, in a second count, alleged an overt act by a fraudulent bill of sale with intent to defraud existing creditors.

An indictment for fraud must state the means.

The Court held, that it was no objection that particular liege subjects were not mentioned; but that the omission, in the first count, to state the means by which the fraud was to be effected, and in the second count, how the deed alleged was fraudulent, were fatal objections; and judgment reversed on error.

(*k*) Of the property, in whom†.

C. H. in and upon the head and back of her the said C. H.; and then and there, with the left foot of him the said T. C., feloniously kicking the said C. H. in and upon the back of her the said C. H.; and then and there, with his hands, feloniously seizing and lifting the said C. H., and then and there feloniously striking the head of the said C. H. against a certain wooden beam of a certain ceiling there; and then and there feloniously, with his arms and hands, lifting up the said C. H., and with great force and violence casting down, flinging, and throwing the said C. H. upon and against a certain brick floor there, with intent, in so doing, her the said C. H., then and there, and thereby feloniously, wilfully, and of his malice aforethought, to kill and murder:"—Held, by the fifteen Judges, that this indictment was good, and that it sufficiently described the injury. (*Rex* v. *Cruse and Wife*, 1838, N. P., 8 C. & P. 541). An indictment, charging that "the prisoner on &c., at L. &c., one coat &c., of the goods &c. of one D. J., in the dwelling-house of W. T., then and there being:"—Held, to shew sufficiently that the house was situate at L., and the conviction proper. (*Rex* v. *Napper*, 1824, 1 Moo. C. C. 44).

* The indictment for stealing in a shop, on 7 & 8 Geo. 4, c. 29, s. 15, must expressly aver a stealing therein; and merely averring that the goods were in the shop, and that the prisoner stole them:—Held insufficient. (*Rex* v. *Smith*, 1836, N. P., 2 M. & Rob. 115).

† Where the indictors or parties injured are partners, joint-tenants, parceners, or tenants in common, it will be sufficient to name one, and to state the property, &c., to belong to him and "another," or "others;" and they may be described thus, wherever it is necessary to mention them. (7 Geo. 4, c. 64, s. 14). Materials for making or repairing county bridges, gaols, or other buildings, may be stated to belong to the inhabitants of the county generally. (Id. s. 15). Goods provided for the poor of a parish or township may be described as the goods of the overseers for the time being. (Id. s. 16). Tools and materials for repairing highways may be described as belonging to the surveyors, without naming them; (Id. s. 16); or tools or materials for turnpike roads, or the buildings, gates, &c., may be described to belong to the trustees or commissioners, without naming them. (Id. s. 17). So, property belonging to the commissioners of sewers may be described as belonging to such commissioners, without naming them. (Id. s. 18).

In an indictment against a servant of the West India Dock Company, for stealing a quantity of canvas and linen belonging to the company, from their ware-

(*l*) Innuendoes*.

(*m*) Conlusions†.

(*n*) Interlineations‡.

(*o*) Joinder and election of counts§.

houses, it was held sufficient to state the property to be the goods and chattels of the West India Dock Company, and not necessary, notwithstanding the words of the 1 & 2 Will. 4, c. 52, s. 33, to allege, in addition, that it was "feloniously taken from the said company." (*Reg.* v. *Stokes*, 1837, C. C. C., 8 C. & P. 151). Where a servant, with his family, inhabited part of the house of business of a company, the whole being open to him, and he and his family the only persons *dwelling* there:—The Judges held, that it might properly be described as his dwelling-house; and semble, it might also have been laid as the house of the company; (*Rex* v. *Witt*, 1832, 1 Moo. C. C. 248); but where a servant was sent out by his master to receive money from the master's customers, and having received the money, he was robbed of it on his way home,—semble, that an indictment for this robbery, in which the money was laid to be the property of the master, could not be supported, as the money had never been in the possession of the master. (*Rex* v. *Rudick*, 1838, N. P., 8 C. & P. 237). Indictment for stealing a copper pipe, fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms, of which A. and B. are separate tenants in the same house. (*Rex* v. *Finch*, 1834, 1 Moo. C. C. 418). Where the property stolen had belonged to a deceased testator, whose executors refused to prove the will, and letters of administration were afterwards granted to a party:—Held, that his rights accruing only from the dates of the letters, the property ought to have been laid in the ordinary. (*Rex* v. *Smith*, 1835, C. C. C., 7 C. & P. 147). Where the dwelling-house is occupied by distinct tenants, and the owner reserves no part to himself, each part may be stated as the separate dwelling-house of each. (*Rex* v. *Bailey*, 1824, 1 Moo. C. C. 23).

* Where the terms of a forged request for goods did not necessarily import a request, although they would be so understood in trade:—Held, that there ought to be an innuendo to explain them. (*Rex* v. *Callen*, 1831, 1 Moo. C. C. 300).

† Where the offence, but for the statute, would not be indictable, the omission of the words "against the form," &c., held not cured by the 7 Geo. 4, c. 64, s. 20. (*Rex* v. *Pearson*, 1831, 1 Moo. C. C. 313). Where an indictment concluded against the peace of our Lord the present instead of the late King:—Held, that a bad conclusion of contra pacem was as if none, but cured by the 7 & 8 Geo. 4, c. 64, s. 20; and that although the objection was taken at the close of the particular case. (*Rex* v. *Chalmers*, 1832, 1 Moo. C. C. 352; S. C., 5 C. & P. 331). So, on a conviction of manslaughter, on an indictment for murder, not concluding contra formam statuti. (*Rex* v. *Berry*, 1835, N. P., 1 M. & Rob. 463). In order to warrant a sentence of transportation for life, on an indictment for a larceny, after a previous conviction for felony, the indictment need not conclude contra formam statuti. (*Rex* v. *Blea*, 1837, N. P., 8 C. & P. 735).

‡ The Court will take notice of a *caret*, so as to read an interlineation in the indictment correctly. (*Rex* v. *Davis*, 1836, N. P., 7 C. & P. 319).

§ Counts for stealing and also for receiving not to be joined in the same indictment. *Rex* v. *Madden*, 1 Moody, C. C. 277, adhering to the Rule in *Rex* v. *Galloway*, 1829, 1 Moo. C. C. 234. So, a count for robbery, and one for assault, with intent to rob:—Held to be improperly joined, and that the prosecutor must elect. (*Rex* v. *Gough*, 1830, N. P., 2 M. & M. 71). The application for a prosecutor to elect, is to the discretion of the Judge. Where several houses had been burnt, and the setting each on fire was alleged, in distinct counts, being one transaction, the Judge refused the application. (*Reg.* v. *Trueman*, 1839, N. P., 8 C. & P. 727). Where there are several indictments for misdemeanors, being substantially the same offence, the Court will order the prosecutor to elect, and abandon the other. (*Rex* v. *Britton*, 1837, N. P., 2 M. & Rob. 297). But where an indictment contained counts, charging a party as accessory, both *before* and *after* the fact, committed by other prisoners:—Held, not improperly joined; and that the prisoner could not be put to elect. (*Rex* v. *Blackson*, 1837, C. C. C., 8 C. & P. 43). Where two different indictments were preferred, one for a capital

IV. RELATIVE TO WITHIN WHAT TIME TO BE PREFERRED*.

V. RELATIVE TO THE GRAND JURY†.

VI. RELATIVE TO THE COPY‡ AND PARTICULAR OF THE OFFENCE§.

REX *v.* REDFERN, M. T. 1834. K. B. 4 *N. & M.* 198.

THE grand jury of Middlesex, on the 10th of November, found a true bill for perjury against the defendant. The prosecutor, wishing

The prosecutor is not bound to

offence, and the other as for a misdemeanor, the Court made the prosecutor elect, and directed an acquittal on the other. (*Rex* v. *Smith*, N. P., 3 C. & P. 412). So, where an indictment charged a stealing, and the other a receiving. (*Rex* v. *Flower*, Id. 413). It is no objection in point of law, that an indictment charges prisoners in one count as principals in stealing, and in another as receivers, or that the prisoners are tried without having the prosecutor put to his election on which charge to proceed, though the prisoners asked it. But semble, that it is reasonable to put the prosecutor to his election, and the officers ought not to join both charges. (*Rex* v. *Galloway*, 1829, 1 Moo. C. C. 234). Wherever it is clear that there is only one offence, the joinder of counts, one as an accessory to the principal felony, and another for receiving, as a substantive felony, under 7 & 8 Geo. 4, c. 29, s. 54, the objection ought not to prevail; but it is a matter wholly in the discretion of the Judge, and not open to demurrer, nor a ground for quashing the indictment. (*Rex* v. *Austen*, 1837, N. P., 7 C. & P. 798.) On an indictment charging W. with stealing and L. with receiving &c., so feloniously stolen as aforesaid, W. being acquitted:—Held, that L. could not be found guilty; but he might be charged with "having received, &c., stolen by some person unknown," being a different charge. (*Rex* v. *Woolford*, 1837, N. P., 2 M. & Rob. 384).

* Preferring a bill of indictment is an act done by the party, as the commencement of a prosecution, although ignored; and semble sufficient to warrant a conviction of the party on another bill subsequently preferred after the time limited for prosecution of the offence. (*Rex* v. *Kilminster*, 1835, N. P., 7 C. & P. 228).

† A grand jury have no authority by law to ignore a bill for murder, on the ground of insanity, though it appears clearly from the testimony of the witnesses as examined by them on the part of the prosecution, that the accused was in fact insane; but if they believe the acts done, if they had been done by a person of sound mind, would have amounted to murder, it is their duty to find the bill, otherwise the Court cannot order the detention of the party during the pleasure of the Crown, as it can, either by arraignment or trial, under the stat. 39 Geo. 3, c. 94, ss. 1 & 2. (*Regina* v. *Hodges*, 1838, C. C. C., 8 C. & P. 195). The grand jury returned a bill of indictment, which contained ten counts, for forging and uttering the acceptance of a bill of exchange, with an indorsement, "A true bill on both counts," and the prisoner pleaded to the whole ten counts. After the case for the prosecution had concluded, the prisoner's counsel pointed this out. The grand jury were discharged, and the Judge would not allow one of the grand jurors to be called as a witness to explain their finding. (*Reg.* v. *Cooke*, 1838, N. P., 8 C. & P. 582; *Reg.* v. *Carlisle*, Id. 584, note).

‡ By 60 Geo. 3 & 1 Geo. 4, c. 4, s. 8, in prosecutions for misdemeanors, instituted by the attorney or solicitor general, in any of the courts therein mentioned, the Court shall, if required, make order that a copy of the information or indictment shall be delivered after appearance to the party prosecuted, or his clerk in court, or attorney, upon application made for the same, free from all expense to the party so applying, provided that such party, or his clerk in court, or attorney, shall not have previously received a copy thereof.

§ Where the counts are framed in general terms, a Judge will order a particular of the charges to be given, so as to disclose the same information to the

pay for the copy of the indictment found, but only the certificate.

to issue a warrant to apprehend the servant, applied to the officer, at the Crown-office, for a certificate of the indictment having been found, upon payment of the usual fee for such certificate only; the practice in the Crown-office being to furnish a copy of the indictment together with the certificate, and to charge fees in respect of each.

Per Cur.—The prosecutor in all cases has a copy of the indictment which he has himself preferred, and the Judge can hold the party to bail upon the certificate alone. The reason suggested for furnishing the copy of the indictment, that otherwise the learned Judge would not know what bail to require, is good; but it appears the Judge has only an *abstract* of the indictment, and not a *copy* when the parties are bailed. We do not, therefore, see why the present practice should continue.

VII. RELATIVE TO THE REMOVAL OF*.

VIII. RELATIVE TO SECOND INDICTMENT PREFERRED FOR SAME OFFENCE.

REX *v.* TREMEARNE, T. T. 1826. K. B. 5 *B. & C.* 761; S. C. 5 *D. & R.* 413; S. C. 1 *Ry. & M.* 147.

If a first indictment be defective, a second, for the same offence, may be preferred, without paying the costs of the first.

ON a rule to shew cause why the prosecutor should not stay all proceedings on a subsequent indictment, until the defendant's costs had been paid—

Per Cur.—If there had been a precedent of a motion similar to that now made to the Court, we might have followed it; but we think that we cannot establish a new rule, that a prosecutor, whose bill has been quashed, shall not be at liberty to prefer another bill until he has paid the expenses attendant on the first. It is a different case, when it is made a condition for quashing the indictment, instead of trying it, that the costs shall be paid before another bill is preferred.—Rule refused.

IX. RELATIVE TO THE TRAVERSE†.

party, as would be done by a special count, but not to disclose specific facts, and dates or places; but a particular ought not to state that the prosecutor will go also into other evidence. (*Rex* v. *Hamilton*, 1836, C. C. C., 7 C. & P. 448). The Court will grant an order on the prosecutor to deliver to the prisoner a particular of the charges; (per *Littledale*—*Rex* v. *Bootymans*, 1832, N. P., 5 C. & P. 300); and by 6 & 7 Will. 4, c. 114, copies of depositions are to be allowed to prisoners.

* Where a magistrate is indicted at a quarter sessions, he being in the commission for the county, and he has circulated among the other magistrates a printed account of the charges brought against him, it is a good ground, within the 5 & 6 Will. 4, c. 33, s. 1, for removing the indictment by certiorari. (*Reg.* v. *Grover*, H. T. 1840, B. C., 8 D. P. C. 325).

† By stat. 60 Geo. 3, c. 4, s. 3, "When any person shall be prosecuted for any misdemeanor by indictment, at any session of the peace, session of oyer and terminer, or gaol delivery, having been committed to custody or held to bail to appear to answer for such offence, twenty days, at least, before the session at which

X. RELATIVE TO THE PRISONERS' RIGHT TO MONEY FOR THE DEFENCE*.

XI. RELATIVE TO DEMURRER†.

XII. RELATIVE TO PLEAS‡. See, also, ante. Vol. 1, p. 544.

XIII. RELATIVE TO THE EVIDENCE.

(*a*) In general§.

Rex *v.* Ellis, M. T. 1826. K. B. 6 *B. & C.* 145.

Where the character of the

On a prisoner being brought up for judgment, it was contended, that, in Hale's "Pleas of the Crown," and in Foster's "Crown

such indictment shall be found, he shall plead to such indictment, and the trial shall proceed thereupon at such session, unless a writ of certiorari for removing such indictment shall be delivered at such session, before the jury shall be sworn for such trial." So, where an indictment for misdemeanor has been found, and afterwards the defendant shall be committed or holden to bail, or shall receive notice of such indictment being found, twenty days at least before the next or subsequent session he shall plead to the indictment, and the trial shall proceed thereupon at such session, unless a writ of certiorari be delivered as above mentioned. (Id. s. 5). But the Court may, in these cases, allow a further time for pleading or trial upon indictment, cause being shewn for that purpose. (Id. s. 7). Nothing in this act, however, shall extend to indictments for non-repair of a bridge or highway. (Id. s. 10). If there be cross indictments for assault to be tried as traverses at the assizes, and the same transaction be the subject of both indictments, the Judge will direct the jury to be sworn in both traverses; and the counsel for the prosecution of that which is entered first will open his case, and call his witnesses. The counsel on the other side will then open his case and call his witnesses, and there will be no reply on either side. (*Reg.* v. *Waklyn* and *Vaughan*, 1838, N. P., 8 C. & P. 290). Under 60 Geo. 3 & 1 Geo. 4, c. 4, ss. 3 and 5, a party acquitted of a felony, for which he has been held to bail, or remanded more than twenty days, is entitled to traverse, on an indictment being preferred against him for the same transaction as a misdemeanor. (*Rex* v. *Williams*, 1835, N. P., 1 M. & Rob. 503). A prosecutor of a traverse at the assizes does not cure the defect of an insufficient notice of the trial of it, by instructing counsel to state that he has not had sufficient notice of trial, or by putting in an affidavit that, in consequence of the insufficiency of the notice, he has not been able to procure the attendance of his witnesses. The proper notice of trying a traverse at the assizes is ten days. (*Reg.* v. *Featherstonhaugh*, 1837, N. P., 8 C. & P. 109). Where a misdemeanor is called on for trial, the prosecutor can only appear generally; and if he appears, he cannot call for proof of notice of trial. (*Rex* v. *Hobby*, 1825, N. P., 1 Ry. & Moo. 241; S. C. 1 Car. & P. 660).

* The Court directed the governor of the gaol to attest the power of attorney, to enable a prisoner to obtain funds out of a savings-bank, to enable him to conduct his defence, or for paying a bonâ fide debt. (*Rex* v. *Coxon*, 1836, N. P., 7 C. & P. 651). And where, from the lapse of time, it might be presumed that the prisoner obtained a portion of money from other sources, the Judge ordered 5*l.* to be given up for his defence. (*Rex* v. *Rooney*, 1836, N. P., 7 C. & P. 515).

† No objections can be taken at the trial of defects cured by 7 Geo. 4, c. 64, ss. 20, 21, but only by demurrer. (*Reg.* v. *Law*, 1837, N. P., 2 Moo. & R. 197).

‡ A prisoner who has pleaded guilty to a charge of larceny, and upon whom sentence has been passed, cannot afterwards be allowed to retract his plea, and plead not guilty. (*Reg.* v. *Sell*, 1840, C. C. C., 9 C. & P. 346). The stat. 7 & 8 Geo. 4, c. 28, s. 2, authorizing the Court to direct a plea of not guilty to be entered for a party who stands mute of malice, or will not answer directly to an indictment, applies to the case of a party who refuses to plead, on the ground that he had previously pleaded to another indictment for the same offence, but which indictment was not valid, in consequence of its having been found upon the testimony of witnesses not duly sworn to give evidence before the grand jury. (*Rex* v. *Bitton*, 1833, O. B., 6 C. & P. 92).

§ If an indictment is founded on a written instrument, the want of the stamp is immaterial; but if it is introduced collaterally, it cannot be read. (*Rex* v.

particular act charged is to be collected from other acts done by the prisoner, they are admissible according to the discretion of the Judge.

Law," it is stated, that, wherever the evidence applies to other offences, as well as that which is under inquiry, the evidence must not be admitted, unless they are felonies of the same kind, so connected that they cannot be separated.

The Court said, they had no doubt upon the subject. All the circumstances attending each case should appear in evidence, for the consideration of the jury; though, of course, it ought not to be allowed to go into evidence of one distinct and unconnected felony, upon an indictment for another. The whole of the evidence in this case was the history of the same transaction. When a man was tried on an indictment for obtaining money, by charging a man with an offence, the prisoner's conduct throughout the whole transaction was fully gone into, though he might have charged the prosecutor several times. In this course of proceeding there was nothing of which the prisoner had any cause to complain.

See Russell & Ryan, C. C. 392.

(*b*) STATEMENTS AND CONFESSIONS BY PRISONERS*. See also, ante, Vol. 2, p. 667.

Smyth, 1832, N. P., 5 C. & P. 201). On an indictment on 42 Geo. 3, c. 107, s. 1, though there must be some evidence to negative the owner's consent, the owner need not be called for the purpose; his non-consent may be inferred from other circumstances, or proved by his agents. (*Rex* v. *Allen*, 1827, 1 Moo. C. C. 154). Where one of two jointly charged with felony, upon their examination before the magistrate, states facts criminating the other in his presence and hearing, which he does not deny:—Held, that it was not competent to the prosecutor to use such evidence as against the latter. (*Rex* v. *Appleby*, 1820, N. P., 3 Stark. 33). Where an accomplice gives evidence against two or more prisoners, which is confirmed only in circumstances affecting one, but not as to the rest:—Held, per *Bayley*, J., that the jury might convict, if they deemed the witness worthy of credit. (*Rex* v. *Dawber*, 1820, N. P., 3 Stark. 34). In an indictment for a felony, it is no objection that there is no proof of such a parish as that laid existing in the county; and semble, not, if proved negatively for the prisoner that there is no such parish. (*Rex* v. *Dowling*, 1826, N. P., 1 R. & M. 433). An illegitimate child, six weeks old, was baptized on a Sunday, and from that day to the following Tuesday was called by its name of baptism and its mother's surname:—Held, to be sufficient evidence to warrant the jury in finding that the deceased was properly described by those names in an indictment for murder. (*Reg.* v. *Walford*, 1839, N. P., 8 C. & P. 767).

* A prisoner charged with felony made a statement before the committing magistrates, which was taken down in writing, but not signed by the prisoner:—Semble, that the magistrate's clerk might give evidence of what was said, using that which was taken down to refresh his memory. (*Rex* v. *Pressly*, 1833, N. P., 6 C. & P. 183). So, a statement made by a prisoner when he is drunk is receivable in evidence; and semble, that if a constable gave him liquor to make him so, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the summing up. If a prisoner, during the examination of the witnesses against him before the magistrate, make an observation, parol evidence may be given of such observation, if the magistrate's clerk prove that he only took down the evidence of the witnesses, and the statement of the prisoner after the evidence against him was concluded. (*Rex* v. *Spilsbury*, 1835, N. P., 7 C. & P. 187). And a witness stated, that a prisoner charged with felony asked him if he had better confess; and the witness replied that he had better not confess, but that the prisoner might say what he had to say to him, for it should go no further. The prisoner made a statement:—Held, that it was receivable in evidence on the trial. (*Rex* v. *Thomas*, 1836, N. P., 7 C. & P. 345). Where the prosecutor, before the magistrate, on a charge of forgery, said, he considered the prisoner as only the tool of another, and the magistrate told the prisoner to be sure to tell the truth:—Held, that the

(*c*) Letters written by prisoner*.

(*d*) Statements by prisoner's wife†.

(*e*) Parol evidence‡.

statement then made was receivable. (*Rex* v. *Court*, 1836, N. P., 7 C. & P., 486). Where parts of the prisoner's statement were in answer to questions put by the magistrate:—Held unobjectionable; held also, that what was said to him by his wife (when in custody) was admissible. (*Rex* v. *Bartlett*, 7 C. & P., N. P., 832). On the trial of a prisoner, who has made before a magistrate a voluntary confession of his guilt, previous to the conclusion of the proofs against him, which confession is taken down in writing, and signed by the prisoner, and attested by the magistrate's clerk; the proper course is for the clerk to give evidence of the prisoner's statements, refreshing his memory by the written paper. (*Rex* v. *Bell*, 1831, N. P., 5 C. & P. 162, questioning *Rex* v. *Fagg*, 1830, N. P., 4 C. & P. 566). It is not necessary to call either the magistrate or his clerk to prove the due taking in writing of a prisoner's confession. (*Rex* v. *Hopes*, 1835, C. C. C., 7 C. & P. 136; S. P. *Rex* v. *Foster*, 1835, C. C. C., Id. 148). A statement by the prisoner, that he should never have written the letter but for G. W.:—Held not to amount to sufficient evidence of sending it. (*Rex* v. *Howe*, 1836, N. P., 7 C. & P. 268). So, if the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt, the Judge will leave the whole of the conflicting statements to the jury for their consideration; but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the Judge will direct an acquittal. (*Rex* v. *Jones*, 1827, N. P., 2 C. & P. 629). And A., being in the custody of a constable on a charge of felony, was taken by the constable to an inn, where the innkeeper, in the hearing of the constable, held out an inducement to A. to confess; and A., in the hearing of the constable, made a confession to the innkeeper, which, at the trial, the constable was called to prove:—Semble, that this confession was not receivable in evidence. (*Rex* v. *Pountney*, 1836, N. P., 7 C. & P. 302). A prisoner, indicted for stealing two heifers, said, "I drove away two heifers from the World's End, Dolver," (i. e. Fen). The prosecutor's farm was called by that name, but he could not swear that there was not any other of the same name in the neighbourhood:—Held insufficient to warrant a conviction. (*Rex* v. *Tuffs*, 1831, N. P., 5 C. & P. 167). And when a prisoner is willing to make a statement, it is the duty of magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have before been on the prisoner's mind that the statement may be used for his own benefit; and the prisoner ought also to be told that what he thinks fit to say will be taken down, and may be used against him on his trial. Nothing should be returned as a deposition, unless the prisoner had an opportunity of knowing what was said, and an opportunity of cross-examining the person making the deposition. (*Reg.* v. *Arnold*, 1838, N. P., 8 C. & P. 621).

* If a prisoner, in gaol on a charge of felony, ask the turnkey of the gaol to put a letter into the post for him, and after his promising to do so the prisoner give him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmit it to the prosecutor, this letter is admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained. (*Reg.* v. *Derrington*, 1826, N. P., 2 C. & P. 418).

† Statements made by the wife to a prisoner, to which he gave an evasive reply:—Held receivable in evidence of implied admissions on the part of the prisoner, and may therefore be observed upon in the opening. (*Rex* v. *Smithies*, 1832, O. B., 5 C. & P. 332).

‡ Where the statements of a party present at the time of the prisoner's examination were believed to have been as usual taken down in writing, though not on oath:—Held, that parol evidence of what was so said could not be received. (*Rex* v. *Hollingshead*, 1830, N. P., 4 C. & P. 242). If a prisoner's examination before a magistrate conclude "taken and sworn before me," and under that be the magistrate's signature, it is not receivable in evidence; and the Judge will neither allow the magistrate's clerk to prove that in fact it was not sworn, nor will he receive parol evidence of what the prisoner said. (*Rex* v. *Rivers*, 1835, N. P., 7 C. & P. 177).

(*f*) Of an alibi*.

(*g*) Of character†.

(*h*) Proof of prisoner's signature to examination‡.

(*i*) Of depositions and statements of party injured§.

* Where the defence set up is an alibi, the prosecutor may shew circumstances proving the prisoner present, although involving a distinct subject of charge against him. (*Reg.* v. *Briggs*, 1837, N. P., 2 Moody & R. 199). Where the defence was an alibi:—Held, that a witness examined in chief for the prosecution might be recalled to be asked as to statements made by the prisoner; as, where he was on the days stated by his own witnesses. (*Rex* v. *Finden*, 1833, N. P., 6 C. & P. 132).

† If a prisoner's counsel elicit, by his cross-examination of the witnesses for the prosecution, a statement that the prisoner has borne a good character, evidence may be given of a previous conviction (by virtue of the stat. 6 & 7 Will. 4, c. 111) just the same as if witnesses to character had been called on his behalf. (*Reg.* v. *Gadbury*, 1838, C. C. C., 8 C. & P. 676).

By 6 & 7 Will. 4, c. 111, a previous conviction not to be given in evidence or read to the jury until after the finding for a subsequent felony, except when evidence as to good character is given.

‡ Where a prisoner signs his examination, his signature may be proved by any bystander; but where he only puts his mark, it must be proved by the magistrate or his clerk, who can alone prove that it was correctly read over to him. (*Rex* v. *Chapple*, 1837, N. P., 2 M. & Rob. 395).

§ In a case affecting the life of a party, it is very desirable that a magistrate, who took the depositions against a prisoner with his own hand, should be called as a witness before the depositions are read, to prove the correctness of what he took down; but it is not absolutely necessary, in point of law, that he should be called, and the depositions may be read on proof of his handwriting. (*Rex* v. *Pikesley*, 1839, C. C. C., 9 C. & P. 124). So, where a prosecutrix, in a case of felony, is bed-ridden, and there is no probability that she would ever be able to leave her house, the Judge will admit her deposition before a magistrate, the same as if she were dead. (*Rex* v. *Hogg*, 1833, N. P., 6 C. & P. 176). So, if a prisoner, when examined before a magistrate, say that the deposition of F. T. is true, the deposition of F. T. may be read at the trial, as a part of the prisoner's statement, although F. T. has been examined at the trial as a witness for the prosecution. (*Rex* v. *John*, 1835, N. P., 7 C. & P. 324). It was proved by the magistrate's clerk that the deposition of a prosecutor was taken before the magistrate, in the presence of the prisoner, who had a full opportunity of cross-examining. The deposition was taken on the same sheet of paper with those of the other witnesses, and at the end of that last deposition were the words "sworn before me," and the magistrate's signature. The prosecutor had died before the trial:—Held, that, on the above facts being proved, the deposition was receivable in evidence on the trial, although the magistrate had not put his signature to this particular deposition. (*Regina* v. *Osborne*, 1837, N. P., 8 C. & P. 113). A., who was a witness for the prosecution against B. on a charge of arson, had first been examined by the magistrate before any specific charge was made against any person, and his deposition taken in writing. A. was next accused of the offence, and his statement, as a prisoner, was also taken down by the magistrate. After this, B. was charged with the offence, and A. examined as a witness; when A.'s statement, made at that time, was taken down, B. being then committed:—Held, that all these statements of A. so taken down ought to be returned to the Judge, and not merely the statement made when B. was committed. (*Rex* v. *Simons*, 1834, N. P., 6 C. & P. 540). But the deposition of a witness for the prosecution, who has gone to sea, cannot be read in evidence on the part of the prisoner, without consent on the part of the prosecutor; with such consent it may be. (*Regina* v. *Hagan*, 1837, O. B., 8 C. & P. 167). So, in a case of rape, if it were proved on the part of the prosecution, that the party alleged to have been ravished has been kept out of the way by the prisoner, the Judge would allow her deposition before the magistrate to be given in evidence; but where that was not proved, and the prosecutrix was not at the trial, evidence of complaints made by her recently after the outrage was rejected, as such evidence is

(*i*) Of the indictment being preferred*.

(*k*) Of an acquittal†.

(*l*) Evidence in reply‡. See also, post, div. *Trial*.

XIV. RELATIVE TO THE WITNESSES.

(*a*) Who may or may not be witnesses.

1. *Of Persons in Court not subpœnaed*§.

2. *Jurors*‖.

received as confirmatory evidence only. (*Reg.* v. *Gutteridge*, 1840, N. P., 9 C. & P. 471). And where a magistrate returned with the depositions taken before him, that the prisoner said, "I decline to say anything:"—Held, that, under these circumstances, a witness for the prosecution could not be allowed to give evidence of the terms of a confession, which he stated the prisoner made in the presence of the magistrate, and while under examination. (*Rex* v. *Walter*, 1836, N. P., 7 C. & P. 267). So, a witness cannot be asked as to what he did or did not state before the magistrate: the deposition must be first put in and read over to him. (*Reg.* v. *Taylor*, 1839, N. P., 8 C. & P. 726). It is the duty of a magistrate to return all the depositions taken against a prisoner, and not merely the depositions of those whom he thinks proper to bind over as witnesses. (*Rex* v. *Fuller*, 1836, N. P., 7 C. & P. 269). The examination of a party, taken in the prisoner's absence, ought not to be returned as one of the depositions: if the prisoner is desirous of making a statement, it is the duty of the magistrate, after a caution that it will be used against him, in order to get rid of any previous impression, to receive it, and have it taken down. (*Reg.* v. *Arnold*, 1838, N. P., 8 C. & P. 621). Where, on the examination before the magistrate of persons charged with felony, the magistrate's clerk, in taking down the prisoner's statements, had left a blank, where either of the prisoners had mentioned the name of another of the prisoners, the Judge at the trial would not allow these blanks to be supplied by parol evidence. (*Reg.* v. *Morse*, 1838, N. P., 8 C. & P. 605). A. was charged with manslaughter, in killing B. by driving a cabriolet over him. C. saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing B. groan, C. went up to him, when B. made a statement as to how the accident had happened:—Held, that this statement was receivable in evidence on the trial of A. for the manslaughter of B. (*Rex* v. *Foster*, 1834, O. B., 6 C. & P. 325; see *Aveson* v. *Kinnaird* (*Lord*), 6 East, 193).

* An allegation, that "on &c., at &c., a certain indictment was preferred at the quarter sessions of the peace then and there holden in and for the said county of N., against the defendant and one T. E., which said indictment was then and there found a true bill," is not supported by the production of the original indictment, with the words "true bill" indorsed on it, it being necessary that a regular record should be drawn up and proved, either by its production or by an examined copy. (*Porter* v. *Cooper*, 1834, N. P., 6 C. & P. 354).

† In order to prove the identity of a prisoner, who is named in a certificate of a previous conviction, it is not necessary to call a witness, who was present at the trial to which the certificate relates; it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate. (*Reg.* v. *Cufts*, 1839, N. P., 9 C. & P. 219). As a plea of autrefois acquit can only be proved by the record, the Court will postpone the trial to enable a prisoner to apply for a mandamus to compel the making up of such record. (*Rex* v. *Bowman*, 1833, O. B., 6 C. & P. 101).

‡ Evidence, which is only a confirmation of the original case, cannot be given in evidence in reply, even if it goes to cut down part of the defence; evidence tending to cut down an alibi, which supported the original case, refused. (*Rex* v. *Hilditch*, 1832, N. P., 5 C. & P. 299).

§ A party present in Court, although not subpœnaed, is bound to answer and give evidence in a criminal case; and a highway indictment is a criminal case in that respect. (*Rex* v. *Sadler*, 1830, N. P., 4 C. & P. 218).

‖ Although the jury may use their general knowledge on the subject of any

3. *Quakers**.

4. *Short-hand Writers in Court*†.

(*b*) Of Witnesses called, but not examined in chief.‡

(*c*) Of prisoners' right to call witnesses indorsed on the indictment§.

(*d*) Effect of witness absconding‖.

(*e*) Ordering witnesses out of court**.

(*f*) Examination and cross-examination††.

question, yet where it relates to a particular trade, and one of the jury be in that trade, he must be sworn as a witness. (*Rex* v. *Rosser*, 1836, N. P., 7 C. & P. 48).

* Where a prosecutor alleged that having been for many years a Quaker, but separated from that sect on some difference of doctrine, and he considered himself a Moravian, but refused to affirm, either in the terms of 9 Geo. 4, c. 32, or of 3 & 4 Will. 4, c. 49, though he declared he was ready solemnly and truly to affirm and declare &c., and that he held it binding on his conscience:—Held, that he was improperly admitted as a witness, and the conviction wrong. (*Reg.* v. *Doran*, 1836, N. P., 2 Moo. C. C. 37).

† Where a witness for the prosecution, in a case of felony at the Old Bailey, on being asked to repeat an answer which she had previously given, before the whole of it had been taken down, omitted what the prisoner's counsel thought an important part of it, and denied that she had ever uttered such part, the Judges allowed the short-hand writer of the Court, who had taken down the answer, to be examined as a witness, to shew whether the words had been used or not. (*Rex* v. *Slater*, 1834, O. B., 6 C. & P. 334).

‡ Where a witness on the bill is tendered, but not examined by the counsel for the prosecution:—Held, that he might be cross-examined, after being examined for the prisoner. (*Rex* v. *Harris*, 1836, N. P., 7 C. & P. 581).

§ If the counsel for the prosecution decline calling a witness whose name is on the back of the indictment, it is in the discretion of the Judge who tries the case, whether the witness shall or shall not be called, for the prisoner's counsel to examine him, before the prisoner is called on for his defence. If the witness be so called, the Judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow the prisoner's counsel to call any witnesses to contradict him; (*Rex* v. *Bodle*, 1833, N. P., 6 C. & P. 186); nor can the counsel for the prosecution lie by until after cross-examination, and then enter upon a fresh inquiry of the witness, as to new facts against the prisoner. (*Rex* v. *Beesley*, 1830, N. P., 4 C. & P. 220).

‖ If it be moved, on the part of the prosecutor, in a case of felony, to postpone the trial, on the ground of the absence of a material witness, the practice, where the absence of the witness can be traced to the acts of the prisoner or his friends, is not to discharge the prisoner from custody except on very sufficient bail; but where no collusion appears between the absent witness and the prisoner, or his friends, the practice is to discharge the prisoner on his own recognizance. (*Rex* v. *Beardmore*, 1836, N. P., 7 C. & P. 497).

** All the witnesses were ordered out of Court; a witness for the prosecution remained in Court. The Judge would not allow him to be examined. (*Rex* v. *Wylde*, 1834, N. P., 6 C. & P. 380).

†† On several indictments of the same party for felony, the witness must be resworn, and may then have the evidence in the former case read over from the Judge's notes, and may avouch its truth. (*Rex* v. *Foster*, 1836, N. P., 7 C. & P. 495). If a party robbed go, within a few hours after the robbery, to a constable, and mention the name of the person who robbed him, the party robbed may be asked at the trial whether he named any person to the constable, but ought not to be asked what name he mentioned; and the constable may be asked whether, in

(*g*) Recalling witnesses*.

(*h*) Commission to examine†.

XV. RELATIVE TO THE NISI PRIUS RECORD‡.

XVI. RELATIVE TO THE TRIAL.

(*a*) Putting off§.

consequence of the party robbed mentioning a name to him, he went in search of any person, and if so, who that person was. (*Rex* v. *Wink*, 1834, N. P., 6 C. & P. 397). On an indictment for a larceny, if the prosecutor rests his case on the prisoner's recent possession of the goods, and the prisoner call a witness to prove that he (the prisoner) bought them of J. T.; if the prosecutor call J. T., he can only ask him as to such matters as go to negative the prisoner's case, and cannot prove by him that he saw the prisoner commit the theft. (*Rex* v. *Stimpson*, 1826, N. P., 2 C. & P. 415). A witness for the Crown cannot be asked, upon cross-examination, whether he did not, before the justices, state so and so, until after his deposition is read, and which is to be taken as part of the evidence of the cross-examining; and if not read, the Court may direct it to be done, which entitles the counsel for the prosecution to a reply: if witness admits such statement to have been made, the prisoner's counsel may comment on the omission, or its effect upon the other parts of his testimony; if he denies it, the prisoner's counsel may call witnesses to prove that he did make it; but in either case the deposition is the prisoner's evidence, and entitling the prosecutor to the reply. (Memorandum, 1837, 1 Moo. C. C. 495; S. C., 7 C. & P. 676). The resolutions of the Judges as to cross-examining from the depositions are binding upon the prisoner's counsel; but it seems that the Judge who tries a case may, if he think fit, notwithstanding those resolutions, himself question a witness as to any discrepancy which appears between his deposition and his evidence on the trial. Whether, if he does so, and thereby introduces new facts in evidence, the counsel for the prosecution will have the right of reply—quære. If a witness admits that, when before the magistrate, he was cross-examined by the prisoner's solicitor, the prisoner's counsel may question him as to the answers he gave, if it appear to the Judge who is trying the case that no cross-examination is returned by the magistrate. (*Rex* v. *Edwards*, 1837, C. C. C., 8 C. & P. 26). The calling of a witness whose name is on the back of the indictment, for the other side to cross-examine him, is by no means of course; it is discretionary, even in felony, but it is a discretion always exercised; and it seems that the same discretion may well be exercised in misdemeanor. (*Reg.* v. *Vincent*, 1839, N. P., 9 C. & P. 91).

* A witness was asked, on cross-examination, whether he had not become bail for a witness previously examined; he replied, "yes, and that he believed it was a charge of keeping a gaming-house." In order to prevent any impression against the character of the party so accused, the Court, at the suggestion of counsel, allowed such party to be called upon again, and asked whether the charge was in fact true or false. (*Rex* v. *Noel*, 1834, O. B., 6 C. & P. 336). Where, after the examination of witnesses to a fact on behalf of a prisoner, the Judge, there being no counsel for the prosecution, calls back and examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again, if he think it material. (*Rex* v. *Watson*, 1833, C. C. C., 6 C. & P. 653).

† The 1 Will. 4, c. 22, s. 4, which gives power to the Court to issue commissions in certain cases for the examination of witnesses, does not apply to indictments. (*Rex* v. *Briscoe*, H. T. 1833, B. C., 1 D. P. C. 520).

‡ The Nisi Prius record of an indictment removed by certiorari need not set out the name of the grand jurors in the caption. (*Rex* v. *Davis*, 1824, N. P., 1 C. & P. 470).

§ The prisoner being acquitted of a rape, the counsel for the prosecution moved to put off the trial for the murder till it could be ascertained whether the Crown would pardon a person convicted of bigamy, to whom it was alleged that one of the prisoners had made an important statement. The Judge postponed the trial, and would not admit the prisoner to bail. (*Reg.* v. *Olivers*, 1839, N. P., 9 C. & P. 83). So the presentment of a bill for a capital offence may be postponed on affidavit of the attorney for the prosecution, stating the illness of a material and necessary witness, although such witness have been examined be-

(*b*) Mode of proceeding at* and duty of counsel†. See, also, 6 & 7 *Will.* 4, *c.* 114—*The Prisoners' Counsel Bill.*

Rex *v.* Despard, T. T. 1828. K. B. 2 *M. & Ry.* 406.

After judgment by default, the counsel for the

On an indictment for a conspiracy, several defendants were brought up for sentence, some after judgment by default and others after verdict—

fore a magistrate, and his deposition do not disclose matter of sufficient importance to shew that his evidence was necessary, as the important facts may have been discovered since. (*Rex* v. *Palmer*, 1834, C. C. C., 6 C. & P. 652). And where the jury panel was taken from amongst persons living near the place in which the trial was to take place, and where, up to the time of the assizes, great excitement had been kept up against the prisoner, charged with murder, the Court reluctantly postponed the trial until the following assizes, when the panel would be drawn from persons in a distant part. (*Reg.* v. *Bolam*, 1837, N. P., 2 Moo. & R. 194). So, the illness of a prosecutor may be a ground for postponing the trial, but not of receiving the depositions taken before a magistrate. (*Rex* v. *Savage*, 1831, N. P., 5 C. & P. 143). And if at the assizes a prisoner is tried for a misdemeanor, under the commission of gaol delivery, and, during the trial, becomes ill, and is obliged to be assisted out of court, the Judge will discharge the jury, and the consent of his counsel that the trial shall proceed in his absence is considered not sufficient to authorize the trial to proceed. If the prisoner recovers during the assizes, he may be tried, the proceedings of the trial to be commenced de novo. (*Rex* v. *Streek*, 1826, N. P., 2 C. & P. 413). But it seems that where there are several indictments against prisoners, on all of which they have been arraigned, the prosecutor, having tried some of the indictments, and failed in obtaining a conviction, ought not to be allowed to postpone the trial of the remaining cases till the next session. (*Reg.* v. *Fuller*, 1839, C. C. C., 9 C. & P. 35).

* Upon the trial of an indictment, the Court refused to allow its validity to be argued at length at Nisi Prius to induce the Court to refuse to try it. (*Rex* v. *Abraham*, 1830, N. P., 2 M. & M. 7).

† In cases of felony it is the duty of the counsel for the prosecution to be assistant to the court in the furtherance of justice, and not to act as counsel for any particular person or party. (*Reg.* v. *Thursfield*, 1838, N. P., 8 C. & P. 269). Wherever there is counsel for the prisoner, the case should be opened by the counsel for the prosecution. (*Rex* v. *Gascoine*, 1837, N. P., 7 C. & P. 772). And although there be none, if the circumstances of the case are peculiar. (*Rex* v. *Bowler*, 1837, N. P., 7 C. & P. 773). In opening the case for the prosecution, counsel held entitled to state to the jury declarations by the prisoner as well as facts. (*Rex* v. *Orrell*, 1835, N. P., 1 M. & Rob. 467). And the counsel for the prosecution, in opening a case of murder, has a right to put hypothetically the case of an attack upon the character of any particular witness for the Crown, and to state that if such attack should be made he shall be prepared to rebut it. He has also a right to read to the jury the general observations of a learned Judge, made in a case tried some years before, on the nature and effect of circumstantial evidence, if he adopts them as his own opinions, and makes them part of his own address to the jury. If additional evidence be discovered during the progress of a case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury. (*Reg.* v. *Courvoisier*, 1840, C. C. C., 9 C. & P. 362). In opening conversations which have passed between the prisoner and a witness, the proper course is for counsel to state only the general effect. (*Rex* v. *Deering*, 1831, N. P., 5 C. & P. 165). Where a defendant, indicted for a misdemeanor, conducts his own cause, and reserves the right of addressing the jury, counsel may argue points of law for him, and suggest questions for him to put, but may not cross-examine the witnesses; (*Rex* v. *Parkins*, M. T. 1824, N. P., 1 Ry. & Moo. 166; S. C. 1 C. & P. 548; see 3 Campb. 98; 25 St. Tr. 1021); but where a prisoner is defended by counsel, who address the jury, the party is not entitled also to make a statement; (*Reg.* v. *Rider*, 1838, N. P., 8 C. & P., 539; S. P. *Rex* v. *Barnes*, 1836, N. P., 2 M. & Rob. 124; S. P. *Reg.* v. *Boucher*, 1837, N. P., 8 C. & P. 141); and his counsel cannot state the prisoner's story, nor any thing which he is not in a condition to prove. (*Reg.* v. *Beard*, 8 C. & P., N. P. 142). In strictness, the counsel may reply, although the evidence called on the part of the prisoner is only to cha-

The Court held, that the counsel for all the prisoners must first be heard in mitigation, and then the counsel for the Crown in aggravation of punishment. prisoner is first heard.

(*c*) Duty of the jury*.

(*d*) By proviso†.

XVII. RELATIVE TO THE VERDICT.

Regina *v.* Virrier, T. T. 1840. Q. B. 4 *P. & D.* 161.

An indictment contained three assignments of perjury. The Judge, in summing up, considering the first and third of these assignments so nearly connected as to constitute one offence, told the jury that the question was, whether the witness had perjured herself "either in stating" &c., (which was the second assignment), "or in stating" &c. (which were nearly in the words of the first and third assignments). The jury found the defendant not guilty on the first assignment, and guilty on the second. The Judge, on application, made an order to amend the postea, (from his recollection of what passed at the trial), by entering the verdict for the Crown on the first and third, and for defendant on the second assignment; but— In criminal cases, amending the postea is done with great caution.

The Court, as a matter of discretion, thought that such an amendment should not be made from the Judge's recollection.

racter, although the Court would recommend the right to be exercised only under special circumstances; (*Rex* v. *Stannard*, 1826, N. P., 7 C. & P. 673); and the right to reply will be on the whole case, and not only on the evidence to character; (*Rex* v. *Whiting*, 1837, N. P., 7 C. & P. 771); and counsel for a prisoner cannot make statements not intended to be proved, without giving a reply to the counsel for the prosecution. (*Reg.* v. *Butcher*, 1837, N. P., 2 Moo. & R. 228). And where A. was charged with feloniously carnally knowing and abusing a girl under ten, B. was charged with being present, aiding and abetting; A.'s counsel called no witness; B., who had no counsel, called a witness to prove an alibi for A.:—Held, that this evidence was in effect evidence for A., and that, in strictness, the counsel for the prosecution had a right to reply on the whole case, but that it was summum jus, and ought to be exercised with great forbearance. (*Reg.* v. *Jordan*, 1839, N. P., 9 C. & P. 118). Prisoners' Counsel Bill, being to enable prisoners to know what they have to answer on their trial, the magistrates, although not bound to take down more than material to prove the charge, are yet bound to take down the whole of the prisoner's statement. (*Rex* v. *Grady*, 1833, C. C. C., 7 C. & P. 650; S. P. *Rex* v. *Coveny*, 1837, C. C. C., 7 C. & P. 667); and since the act, it is proper to take down the witnesses' statements fully upon the matter in question. (*Rex* v. *Thomas*, 1837, N. P., 7 C. & P. 817).

* The jury should take the law from the Judge; and therefore, where cases had been cited to the Judge on a legal argument, and he had given an opinion on them, they were not allowed to be read to the jury in the address of the prisoner's counsel to them. (*Rex* v. *Parish*, 1837, N. P., 8 C. & P. 94). In a case of manslaughter, after the jury were charged, it was ascertained that the surgeon who examined the body was absent. The prisoner's counsel asked that the jury should be discharged:—Held, that, if the prisoner asked that the jury should be discharged, the Judge had authority to order it to be done. (*Rex* v. *Stokes*, 1833, N. P., 6 C. & P. 151).

† Where a prosecutor, having struck a special jury, withdrew the record, and the defendant took the case down by proviso:—Held, that he had a right to bring on the trial upon a common jury panel. (*Rex* v. *Derbishire*, 1833, N. P., 1 M. & Rob. 307).

XVIII. RELATIVE TO THE RECORD OF ACQUITTAL, AND OF DETAINING THE PRISONER TO BE AGAIN INDICTED*.

BROWNE *v.* CUMMING, M. T. 1829. K. B. 10 *B. & C.* 70.

If a copy of acquittal be obtained, the Court will not restrain the use of it.

To enable the plaintiff to proceed with facility, he had obtained a copy of the indictment and acquittal against him, for the preferring of which he brought the present action. This had been obtained upon a fiat by the Attorney-General, upon a statement of facts made to him on the part of the plaintiff. It being stated, upon affidavit, that this fiat of the Attorney-General had been obtained upon a misrepresentation to him of the facts, the defendants obtained a rule calling on the plaintiff to shew cause why proceedings in this action should not be stayed, or why the plaintiff should not be prevented from using, on the trial, the copy of the indictment so obtained.

Lord *Tenterden*.—The alleged mistake or misrepresentation in this case is not of such a nature as to justify this Court in interfering.

XIX. RELATIVE TO THE JUDGMENT†, AND WRIT OF ERROR ON.

REX *v.* MAHON, E. T. 1837. K. B. 1 *N. & P.* 575.

Where an action is pending for the same assault, the Court will not pass sentence.

ON an application that judgment be passed on the defendant for an assault of which he had been found guilty, it appeared that an action was then pending for the same assault.

Per Cur.—The Court will not pass sentence on a conviction for an assault where an action is pending for the same assault.

REG. *v.* DIGNAM, T. T. 1837. Q. B. 7 *Ad. & E.* 593.

Where a party pleads, and is brought up for judgment, affidavits in aggravation are first read.

ON a defendant being brought up for judgment—

The Court said, where the party having pleaded is brought up for judgment, the affidavits in aggravation are to be first read, and counsel for the Crown to be heard before that for the defendant; contra, where the verdict is taken by consent, and without evidence. And the rule is not varied where there are several defendants, and some plead guilty, and others are convicted on a verdict.

* Where the prosecutor was unable to attend from the consequences of violence used towards him:—Held, that it is for the Judge to decide in each instance whether it is a case requiring the detention of the prisoner, or admit him to bail. (*Rex* v. *Osborn*, 1837, N. P., 7 C. & P. 799).

† On a conviction of two separate offences of uttering counterfeit coin, in two counts, one judgment for two years' imprisonment under 2 Will. 4, c. 34, s. 7, is bad. (*Rex* v. *Robinson*, 1834, 1 Moody, C. C. 413). Judgment may be given in the absence of a defendant, who is unable to attend from age and infirmity. (*Rex* v. *Constable*, M. T. 1826, K. B., 7 D. & R. 663). A prisoner omitting to pray his clergy in a clergyable offence (now abolished by 7 & 8 Geo. 4) before judgment passed, may be brought up and pray it on being asked why execution should not be awarded. (*Rex* v. *Armstrong*, 1824, 1 Moo. C. C. 21).

REX *v.* ELLIS, E. T. 1826. K. B. 5 *B. & C.* 395; S. C. 8 *D. & R.* 173.

If a party guilty of petty larceny be condemned to a punishment applicable to a statutory offence, the judgment will be erroneous*.

BY 3 Geo. 4, c. 38, it is enacted, "that if any servant shall steal any money from his master, and shall be convicted thereof, and be entitled to the benefit of clergy, he, instead of being subjected to such punishment as may now by law be inflicted upon persons so convicted, and entitled to benefit of clergy, shall be transported for fourteen years." The defendant was indicted for petit larceny. The jury having found the prisoner guilty upon the indictment generally, the Court adjudged that he be transported to parts beyond the seas for the term of fourteen years. A writ of error having been brought upon this judgment, the error assigned was, that, by the law of the land, the defendant could not for the offence charged in the indictment be legally transported beyond the seas for the term of fourteen years, or for any longer term than seven years.

The Court reversed the judgment.

REX *v.* BOURNE, E. T. 1837. K. B. 7 *Ad. & E.* 58.

If an erroneous judgment be pronounced, on error† it cannot be corrected by remitter to the Court below.

PARTIES were convicted of an offence which subjected them to capital punishment, and the judgment pronounced was of transportation, upon which a writ of error was brought.

The Court held, that the Judge being functus officio, it could not be remitted back, nor could the Court of error give the proper judgment.

XX. RELATIVE TO THE COSTS.

REX *v.* COOKE, H. T. 1828. K. B. 1 *M. & Ry.* 526.

Prosecutors by subscription are not entitled to costs under 5 W. & M. c. 11‡.

THIS was an indictment against a surgeon for a misdemeanor in disinterring a corpse for the purpose of dissection. He was convicted, and fined 100*l.* The indictment had been removed into this Court from the sessions at the instance of the defendant, and upon that occasion he had entered into the recognizance required by the 5 W. & M. c. 11, s. 2. The parties engaged for the prosecution (who

* Where parties had been convicted of offences under 7 & 8 Geo. 4, c. 29, but were brought up to receive judgment on a day after the passing of 2 & 3 Will. 4, c. 62:—Held, that the sentences could only be founded on the latter statute. (*Rex* v. *Lewis*, 1834, 1 Mood. C. C. 372).

† The rule, that, if the Crown will not join in error, the party is entitled to be discharged, applies to felony as well as misdemeanors. (*Rex* v. *Hawes*, 7 Ad. & E. 603).

‡ The Court may award the prosecutor his costs of a prosecution for a felony, even though not under any recognizance. (*Reg.* v. *Butterwick*, 1837, N. P., 2 Moo. & R. 196). And a party who is bound over to prosecute at a superior court by a court of quarter sessions, is entitled to his expenses under the statute. (*Rex* v. *Paine*, 1835, C. C. C., 7 C. & P. 135). But under 7 & 8 Geo. 4, c. 30, s. 16, held, that, where an indictment for felony had been removed by certiorari, and tried on a record out of K. B., the statute did not apply to give the expenses. (*Rex* v. *Kelsey*, M. T. 1832, B. C., 1 D. P. C. 481). And the Court cannot order costs to be paid to a prisoner upon postponement of the trial. (*Rex* v. *Crowe*, 1829, N. P., 4 C. & P. 251).

were the relatives of the deceased, and the prosecution was conducted by subscription) had obtained a rule to shew cause why they should not be allowed their costs under the 3rd section of that statute, which enacts, that "if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured," &c.

The Court discharged the rule, being of opinion that the persons in whose names the prosecution was carried on did not appear to be prosecutors within the meaning of the act, no expense having been incurred by them.—Rule discharged.

XXI. RELATIVE TO EXECUTION*.

XXII. RELATIVE TO AMENDING THE SENTENCE†.

XXIII. RELATIVE TO NEW TRIAL‡.

XXIV. RELATIVE TO RESTITUTION OF PROPERTY§.

Indorsement. See tits. *Bills and Notes—Deeds.*.

Infant.

See tits. *Bankrupt—Outlawry.*

I. RELATIVE TO HIS BEING LEGITIMATE OR ILLEGITIMATE. See ante, tit. *Bastard.*

II. RELATIVE TO THE CUSTODY OF, p. 269.

III. RELATIVE TO THE RIGHTS OF, p. 269.

* When a jury of matrons, impanelled to try whether a prisoner is quick with child, require the assistance of a medical person, he must be examined as a witness in Court; and held (per *Gurney*, B.), that "quick with child" means having conceived. (*Reg.* v. *Wycherley*, 1838, N. P., 8 C. & P. 262).

† Under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, the party convicted can only apply to the Court to amend the sentence passed below by shewing an essential defect therein. (*Rex* v. *Lloyd*, E. T. 1833, K. B., 4 B. & Ad. 135).

‡ Where, on a plea of autrefois convict, the verdict was found for the prisoner :—Held, that a new trial could not be granted, although unsupported by evidence, and against the opinion of the Judge. (*Reg.* v. *Lea*, 1837, N. P., 2 Moody, C. C. 9).

§ The Court refused to order restitution of a bank-note, which had been stolen and afterwards stopped and cancelled at the Bank of England, having ceased to be property. (*Rex* v. *Stanton*, 1836, C. C. C., 7 C. & P. 431). But where the prisoner was found in possession of a horse, which had been clearly purchased with the proceeds of a bill which he was found guilty of stealing, the Court ordered the horse to be delivered to the prosecutor. (*Rex* v. *Powell*, 1836, C. C. C., 7 C. & P. 640).

IV. RELATIVE TO THE LIABILITY OF.

(*a*) For necessaries, p. 270.

(*b*) For money paid at his request, p. 272.

(*c*) On a cognovit, p. 272.

V. RELATIVE TO THE RATIFICATION OF CONTRACTS AFTER COMING OF AGE, p. 272.

VI. RELATIVE TO THE LIABILITY OF THE PARENTS, p. 273.

VII. RELATIVE TO THE PROCHEIN AMY, p. 274.

VIII. RELATIVE TO ACTIONS BY AND AGAINST.

(*a*) Notice of action, p. 274.

(*b*) Appearance, p. 275.

(*c*) Evidence, p. 275.

(*d*) Costs, p. 275.

(*e*) Execution, p. 275.

II. RELATIVE TO THE CUSTODY OF*. See, also, tit. *Habeas Corpus.*

III. RELATIVE TO THE RIGHTS OF†.

Corpe *v.* Overton, T. T. 1833. C. P. 10 *Bing.* 252; S. C. 3 *M. & Scott,* 738.

An infant who paid a deposit, with a view to a partnership, may, on his

The plaintiff, whilst an infant, advanced money as a deposit, with a view to a future partnership in trade, and upon his coming of age refused to complete the contract.

The Court held, that having a right so to do, he might recover

* By 2 & 3 Vict. c. 54, s. 1, Judges in equity may make order, on petition, for access of mothers to their infant children; and if such children be within the age of seven years, for the delivery of them to their custody, until attaining such age.

Sect. 2. Affidavits to be received, and parties deposing falsely therein deemed guilty of perjury.

Sect. 3. Orders may be enforced by process of contempt.

Sect. 4. No mother, against whom adultery has been established, entitled to benefit of this act.

Sect. 5. Act may be altered this session.

The mother is entitled to the custody of the child, where the father is a convicted felon on board the hulks. (*Bailey, Ex parte,* H. T. 1838, B. C., 6 D. P. C. 311).

† If a father make to a son under age an absolute gift of an article of dress or ornament, *e. g.* a watch, he cannot afterwards, without that son's consent, reclaim the gift. (*Smith* v. *Smith,* 1836, N. P., 7 C. & P. 401).

coming of age, decline, and recover back the money so paid.

back the money, as paid without consideration. The rule, also, that an infant is exempted from a penalty on a breach of condition, would extend equally to a penalty paid in advance.

IV. RELATIVE TO THE LIABILITY OF.

(*a*) For necessaries.

PETERS *v.* FLEMING, H. T. 1840. Ex. 6 *M. & W.* 42.

What are necessaries depends upon the station in life, and is a question for the jury*.

To a declaration in debt for goods sold and delivered, for work done and materials provided, and for money due on an account stated, the defendant pleaded nunquam indebitatus, and a plea of infancy. The plaintiff joined issue on the first plea, and to the second replied, "that the goods were, at the time of the sale and delivery thereof, necessaries, suitable to the then degree, estate, and condition of the defendant."

The Court held, 1st, that necessaries are such things as are absolutely requisite for bare subsistence: articles which are purely ornamental, and not useful, are not in any case necessaries; and, 2ndly, whenever an article may be necessary, it is for the jury, under all the circumstances, to judge of the quality and degree of ornament, and to say whether it is such as a reasonable person, of the age and station of the infant, would require for real use.

LOW *v.* GRIFFITH, T. T. 1834. C. P. 1 *Scott*, 458.

An infant is only entitled to a necessary dwelling†.

THE defendant, an infant, having served an apprenticeship to a barber, took a house, consisting of five rooms; in one he lived, in another he carried on his business, and underlet the others. The jury, having found that a house of such a description, regard being had to his station and circumstances, was not a necessary dwelling for him—

The Court refused to disturb the verdict.

* Where the question is on the issue of the goods furnished to an infant being necessaries, the quantity is as much for the consideration of the jury as the quality; and with that view, they may look at the supplies by other tradesmen; and the plaintiff would not be entitled to recover for what has been supplied from any quarter, beyond what is suitable to the infant's estate and degree. (*Burghart* v. *Angerstein*, M. T. 1834, N. P., 6 C. & P. 690).

† Where a father sufficiently supplies the defendant, his son, a minor, with clothes:—Held, that the question was, whether the articles of clothing supplied by the plaintiff were necessaries. If a tradesman trusts an infant, he does it at his peril, if it turn out that he has been properly supplied. (*Story* v. *Pery*, H. T. 1831, N. P., 4 C. & P. 526). A., a minor, had held a commission in the army, but sold it, by reason of not having sufficient fortune to continue to hold it. His father was a beneficed clergyman, who paid various sums for him during his minority, and gave him a further sum of 1,500*l.* when he attained the age of twenty-one years:—Held, that a stanhope was not necessary for him while a minor, as being suitable to his estate and degree. (*Charters* v. *Bayntun*, E. T. 1835, N. P., 7 C. & P. 52). Where the debt was for grocery goods to stock his shop, but out of which his family were supplied:—Held, that, pro tanto, as necessaries, he was liable to be sued. (*Turberville* v. *Whitehouse*, 12 Price, 692).

BRAYSHAW *v.* EATON, H. T. 1839. C. P. 5 *Bing. N. S.* 231; S. C. 7 *Scott*, 183.

To enable a party to recover as for necessaries, he need not have ascertained the defendant's circumstances.

THIS was an action to recover 9*l.* 18*s.*, the amount of a tailor's bill, to which the plea was infancy, and the replication, necessaries—

The Court refused to disturb the verdict found for the plaintiff, although he made no inquiries into the situation, wants, &c., of the infant at the time of furnishing him with the goods; which inquiries might, if made, have satisfied him that the infant lived apart from his mother, and had been provided by her with a reasonable supply of clothes within the current year; inasmuch as the making of inquiries by tradesmen, though an act of commendable prudence, is not an inflexible rule of law, nor a condition precedent to the supplying of the articles.

DALTON *v.* GIB, H. T. 1839. C. P. 5 *Bing. N. C.* 199.

And if the mother be present when the order is given, an inquiry as to her sanctioning the purchase is not requisite.

THE mother and daughter (an infant) went together in a carriage to the shop of the plaintiff, and the daughter selected the articles, which were put into the carriage, and taken to the hotel by the mother. In an action for the amount of certain articles of dress, to which the plea was infancy, and the replication, necessaries—

The Court held, that, supposing it to be necessary for the tradesman to make inquiries into situation, circumstances, &c., before he supplies an infant, residing under the same roof with her parent, with certain articles, the conduct of the parent may be of such a nature as to preclude the necessity of making such inquiries; and the Court refused to disturb the verdict found for the plaintiff.

BURGHART *v.* HALL, E. T. 1839. Ex. 4 *M. & W.* 727.

An infant may bindingly contract for necessaries, although he has sufficient income to pay ready money.

THE defendant in this action (which was brought by a tailor for the price of clothes) pleaded the infancy of the testator, and the replication was necessaries. It was proved at the trial that the testator was an officer in the Life Guards, and had an allowance of 500*l.* per annum, besides his pay. Lord *Abinger*, C. B., told the jury, that, if an infant had an income sufficient to supply him with suitable necessaries for ready money, he could not contract for such things on credit; and the jury, under this direction, found for the defendant.

Lord *Abinger*, C. B., in a subsequent term, said that the rule for a new trial must be absolute, and that the law had been too rigorously laid down by him to the jury. A minor is capable by law of entering into any reasonable contract for necessaries, though not for ready money, and though he may have a sufficient income.

HARRISON *v.* FANE, M. T. 1840. C. P. 1 *Scott, N. S.* 287; S. C. 1 *M. & G.* 550.

On the question of necessaries, if the verdict be perverse, a new trial will be granted without costs.

IN an action for the hire of horses and gigs, let to the defendant, an infant, at Oxford, the jury having found a verdict for the plaintiff as for necessaries, a rule for a new trial, with costs, granted, the verdict being perverse.

(*b*) For money paid at his request.

Hunt *v.* Massey, H. T. 1834. K. B. 3 *N. & M.* 109.

An infant after coming of age, who directs another to pay a bill accepted during his infacy, is liable for the money so paid.

The defendant, an infant, accepted a bill during minority. He became of age 19th of June, 1832, and the bill fell due on 4th of July, 1832. The plaintiff produced a letter in the handwriting of the defendant, which was dated on the 22nd June, 1832, addressed to a third person, requesting him to pay the plaintiff 101*l.* out of a sum left to the defendant by his grandfather. It was objected to on the part of the defendant, that the declaration did not contain any special count founded on the promise to pay, made after the defendant became of age. The jury found a verdict for the plaintiff, and the Court refused to interfere.

(*c*) On a cognovit.

Oliver *v.* Woodruffe, H. T. 1839. Ex. 7 *D. P. C.* 166; S. C. 4 *M. & W.* 650.

An infant cannot bind himself by cognovit.

A cognovit was given by a minor, authorizing an attorney to appear for him, and confess an action brought against him for a precise sum for necessaries provided for him by the plaintiff, with an understanding "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment, or suing out execution."

The Court held the cognovit bad on three grounds:—1st, that an infant cannot appoint or appear by attorney, but only by a guardian; 2ndly, that he cannot state an account; 3rdly, that he cannot deprive himself of his right to bring a writ of error, or any right to which he was entitled.

V. RELATIVE TO RATIFICATION OF CONTRACTS AFTER COMING OF AGE.

Hartley *v.* Wharton, E. T. 1840. Q. B. 11 *Ad. & E.* 934; S. C. 3 *P. & D.* 529.

An infant, after coming of age, ratified a contract by letter, not addressed to the plaintiff:—Held sufficient.

In assumpsit the plaintiff replied to a plea of infancy, "that the defendant ratified by promise in writing on coming of age." It appeared that it was contained in a letter referring to the debt, and signed by the defendant; but there was no name of the party to whom addressed, nor amount mentioned—

The Court held, 1st, that they might be supplied by parol evidence; and, 2ndly, that the proof of infancy lay on the defendant.

By 9 Geo. 4, c. 14, infants must affirm their contracts, after coming of age, by writing.

By 9 Geo. 4, c. 14, s. 5, it is enacted, "That no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract, made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith."

VI. RELATIVE TO THE LIABILITY OF THE PARENTS*.

LAW *v.* WILKINS, T. T. 1836. K. B. 1 *N. & P.* 697; S. C. 6 *Ad. & E.* 718.

If a father sees his son wear a suit of clothes, it is a question for the jury if he sanctioned the order.

IN an action for goods sold, it appeared that the goods (clothes) had been supplied to the defendant's son; but that the defendant had seen his son wear the clothes; it also appeared that the son was only 14 years of age.

The Court held, that whether the defendant authorized the son to purchase them was a question for the jury.

URMSTON *v.* NEWCOMEN, T. T. 1834. K. B. 4 *Ad. & E.* 899.

If a child lives with another without any desertion on the part of the parent, he is not liable.

U. OFFERED to N. to take care of N.'s child, without putting N. to any expense, upon which N. gave up the child to U.; afterwards, U. gave up the child to N.'s wife, who was living apart from N. in adultery; and afterwards the child, to escape cruel treatment by N.'s wife and the adulterer, returned to N., who maintained it thenceforward.

The Court held that N., who had no notice of the child quitting U. at all, or of the cruelty, was not liable to U. for the maintenance of the child, inasmuch as the facts did not shew any desertion of the child by N., and negatived a contract between N. and U.; and that it made no difference that U., when she made the original undertaking, was a married woman; the ground of the decision being, not that U. had made a valid contract, but the circumstances negatived desertion; and that, therefore, the question as to the implied liability did not arise.

MORTIMORE *v.* WRIGHT, E. T. 1840. Ex. 6 *M. & W.* 482.

To render the parent liable, he must have authorized the child to incur the debt†.

THE defendant's son, an infant of twenty years of age, had lodged some time with the plaintiff, during a part of which he had earned wages, and paid for his board, &c.; he afterwards fell ill, and was unable to pay for the necessaries which the plaintiff continued to supply him. The plaintiff applied to his father for money, who wrote in answer that he could not advance any at that time, but his son would come into possession of money in the following month, when he would be twenty-one, and would then be able to pay what he owed the plaintiff himself.

The Court held, 1st, that this letter was no admission of a liability in the father; and, 2ndly, that the moral obligation, which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by that child; and he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them.

* No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. (*Sedborne v. Maddy*, 1840, N. P., 9 C. & P. 497). Every man is to maintain his own children as he himself shall think proper; and it requires a contract to enable another person to do so, and charge him for it in an action. (Ib.)

† Quære, whether a father deserting his infant child be liable in assumpsit to a party who supplies the child with necessaries, no further proof of contract being given? No such action can be maintained, if the father had reasonable ground to suppose that the child was provided for. (*Urmston v. Newcomen*, 4 Ad. & E. 899).

VII. RELATIVE TO THE PROCHEIN AMY.

MORGAN *v.* THORNE, H. T. 1841. Ex. 9 *D. P. C.* 228; S. C. 7 *M. & W.* 400.

A father requires no authority from his son to sue as prochein amy*.

THE wife of a minor having committed adultery whilst her husband was abroad in the East Indies, the father procured himself to be appointed prochein amy, and commenced an action for crim. con. in his son's name, without his knowledge or authority, and recovered a verdict. On a motion to set aside the proceedings, on the ground of there being no authority from the son to bring the action—

The Court held, 1st, that as the defendant had reason to believe, long before the trial, that the authority of the son could not have been obtained, he ought to have made inquiries then, and that the application was now too late; and 2ndly, that no authority from the son was necessary to enable the father to sue as prochein amy; and there being nothing to shew that he was not properly appointed prochein amy, that it must be assumed to have been properly done; and that the son would be bound by the judgment in this action.

VIII. RELATIVE TO ACTIONS BY AND AGAINST†.

(*a*) NOTICE OF ACTION.

DE GONDOUIN *v.* LEWIS, E. T. 1839. Q. B. 10 *Ad. & E.* 117; S. C. 2 *P. & D.* 283.

A notice of action, signed by any prochein amy, is sufficient, though his name be not on the record.

IN trespass against custom-house officers, notice of action was given on the 12th of September, stating the goods to be those of Adolphe de Gondouin, of No. 8, Portland Place, Brighton, and signed by "Augustus Edward Pilcher, No. 88, Montpelier Road, Brighton, acting in behalf of and as the prochein amy of the said Adolphe de Gondouin, an infant of the age of twelve years." Pilcher acted as the attorney in the cause. The defendants objected to this notice of action, as not being conformable to the provisions of 3 & 4 Will. 4, c. 53, s. 183, which directs, that "no writ shall be sued out &c. against any officer of the customs until one calendar month next after notice shall have been delivered to him, or left at his usual place of abode, by the attorney or agent of the party who intends to sue out such writ or process as aforesaid; in which notice (among other things) shall be contained the name and place of abode of the

* Where an uncertificated bankrupt was appointed to act as prochein amy for an infant plaintiff, the Court, on affidavit of the facts, removed him, and ordered another to be appointed. (*Watson* v. *Fraser*, 9 Dowl. P. C. 741). Semble, that the father of an infant is the proper person to be appointed to act as his prochein amy; and if his evidence is likely to be required on the trial, a special application ought to be made to the Court to remove him and appoint another. (Ib.) Quære, whether poverty in a prochein amy is, in general, a ground for removing him? (Ib.)

† By Rule, H. T. 2 Will. 4, a special admission of prochein amy or guardian, to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified.

person who is to bring such action, and the name and place of abode of the attorney or agent." The objection was overruled, and the plaintiff had a verdict. On motion for a nonsuit—

The Court held, that notice of action (under stat. 3 & 4 Will. 4, c. 53, s. 103) by an infant, to an officer of the customs, may be given by his prochein amy, although he may not be the prochein amy on the record.

(*b*) Appearance*.

(*c*) Evidence†.

(*d*) Costs, when to give security for. See ante, tit. *Costs.*

Evans *v.* Davis, E. T. 1831. Ex. 1 *C. & J.* 460; S. C. 1 *Tyrw.* 345.

An order was made in the Court of Great Sessions upon the infant plaintiff to pay certain costs. The cause was subsequently removed into this Court, and a rule nisi for an attachment for non-payment of the costs was obtained, calling upon the prochein amy to shew cause why an attachment should not issue against her for non-payment of the costs, which rule, no cause being shewn, was made absolute.

Where the Court of Great Sessions ordered the prochein amy to pay costs, the Court granted an attachment‡.

(*e*) Execution§.

Defries *v.* Davies, E. T. 1835. C. P. 3 *D. P. C.* 629; S. C. 1 *Bing. N. S.* 692; S. C. 1 *Scott*, 594.

The defendant (an infant), in execution for costs and damages awarded against him in an action of slander, applied for relief to the

An infant is not entitled to be

* Appearance by an attorney is irregular. (*Nunn* v. *Curtis*, H. T. 1836, Ex., 4 D. P. C. 729). If an infant appear in person, not by guardian or prochein amy, it is error in fact. (*Castledine* v. *Mundy*, 1 Nev. & M. 635; 4 B. & Ad. 90). Such error may be assigned in the Court by which the judgment is pronounced; so, it may be assigned in a court of error, except Dom. Proc. and (before 1 Will. 4, c. 70) the court of error constituted by 27 Eliz. c. 8. If an infant assigns by attorney, for error coram vobis, that he has improperly appeared in the action by attorney instead of guardian, it is not a mere irregularity, but a ground of error; still, the Court will, on application, set the assignment aside, and allow the plaintiff in error to assign by guardian. (*Beven* v. *Cheshire*, M. T. 1834, B. C., 3 Dowl. P. C. 70).

† In assumpsit, by an infant suing by his prochein amy:—Held, that the declarations of the latter before action brought were clearly inadmissible evidence for the defendant; but the plaintiff not having objected in time, they could not, after he had taken the chance of their turning to his advantage, be excluded). (*Webb* v. *Smith*, 1824, N. P., 1 R. & Moo. 106).

In deciding the question whether goods supplied are necessaries:—Held, that evidence to shew that, at the time of sale, the defendant's father had furnished him with goods of the same kind, suitable to his condition, was admissible). (*Burkhardt* v. *Angerstein*, 1835, N. P., 1 M. & Rob. 458).

‡ But this case was before 11 Geo. 4 & 1 Will. 4, c. 70.

§ Where an infant, suing by his prochein amy, was nonsuited, and afterwards a writ of error sued out but not pursued:—Held, that execution properly issued, although the writ was not non-prossed; but quære, if he could be taken in execution for such costs? (*Dow* v. *Clark*, M. T. 1833, Ex., 2 D. P. C. 302; S. C. 1 C. & M. 860).

discharged from an execution in an action of slander.

Insolvent Debtors' Court; but that Court refused to interfere, as the infant could not execute a warrant of attorney, as required by the statute.

Held, that the Court in which the action was brought had no authority to discharge the infant.

Information.

I. RELATIVE TO CRIMINAL INFORMATIONS.

(*a*) In general.

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2. *Rule for*, p. 277.
3. *Affidavits connected with*, p. 277.
4. *Pleadings connected with*, p. 278.
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6. *Judgment on*, p. 279.

(*b*) In particular.

1. *Against Justices of the Peace.* See tit. *Justice of the Peace.*
2. *In cases of Libel.* See tit. *Libel.*
3. *In cases of Slander.* See tit. *Slander.*

II. RELATIVE TO INFORMATION FOR PENALTIES.

(*a*) When it lies, p. 279.
(*b*) Against whom it lies, p. 280.
(*c*) Relative to the form of, p. 281.
(*d*) Rule to reply, p. 282.
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III. RELATIVE TO OTHER INFORMATIONS, p. 284.

I. RELATIVE TO CRIMINAL INFORMATIONS.

(*a*) In general.

1. *When it lies.*

Regina *v.* Gwilt, E. T. 1840. K. B. 8 *D. P. C.* 476; S. C. 11 *Ad. & E.* 587; S. C. 3 *P. & D.* 176.

Giving a party in charge for an

A person being assaulted in the streets, called a policeman, and gave the party assaulting in charge, and then, under the

advice of the policeman, obtained a warrant, but did not appear to prosecute. A rule had been obtained calling upon the defendant to shew cause why a criminal information should not be granted.

Per Cur.—The case of *Rex* v. *O'Gorman Mahon*, (4 Ad. & E. 576), has no application to this case. There proceedings under the warrant were actually pending, and it was therefore thought best to leave the party to his ordinary remedy. Here the policeman was called in at once, in the heat of the struggle, in order to prevent a repetition of the assault.—Rule absolute.

assault, which is abandoned, does not preclude the party from moving for a criminal information*.

REX *v.* LARRIER, H. T. 1836. K. B. 7 *Ad. & E.* 277.

ON an application for a criminal information for sending a challenge by a party who had himself sent one to a party to the same transaction—

The Court held he was not entitled, although the latter challenge took place in a foreign country, and no breach of the peace respecting it was contemplated here.

A party who has sent a challenge cannot apply for a criminal information, because he has received one.

CHAPMAN, *Ex parte*, T. T. 1834. K. B. 4 *Ad. & E.* 773.

ON motion for a criminal information for calling a party a liar, and stating that he wilfully absented himself from an election, and threatening to repeat the charge whenever the defendant met him; it not appearing to be the defendant's intention to provoke a breach of the peace—

The Court refused the information.

To ground a criminal information, a breach of the peace must be contemplated.

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2. *Rule for.*

REX *v.* STEWARD, T. T. 1830. K. B. 1 *B. & Ad.* 12.

THIS was an application for a rule for a criminal information, for bribery at an election to a corporate office.

The Court granted the rule upon the sole testimony of a particeps criminis uncontradicted, it being an offence against the public interest, and in which the duties of justices were involved, distinguishing the case from that of a mere simple private fraud.

Where the public interest is concerned, a rule for a criminal information will be granted upon the testimony of a particeps criminis.

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3. *Affidavits connected with.*

REX *v.* FRANCIS, M. T. 1834. K. B. 4 *N. & M.* 251; S. C. 2 *Ad. & E.* 49.

THE copy of the affidavit from the Stamp-office stated the place where a paper was published to be "Union-court, Castle-street,"

On motion for a criminal infor-

* But in *Ex parte* ——, *one*, *&c.* (4 Ad. & E. 576, n.), the Court refused a rule for a criminal information for an assault, upon its appearing that the applicant had taken out a warrant against the other party; though the applicant offered that it should be part of the rule, that he should abandon the proceedings or the warrant.

mation, the applicant should be prepared with proper affidavits in the first instance.

and the paper was annexed to the affidavit; the affidavit being insufficient, another application was made for the information; but—

The Court refused the rule on the ground that the party ought to have produced a proper affidavit in the first instance.

REX *v.* SMITHSON, E. T. 1833. K. B. 1 *N. & M.* 775; S. C. 4 *B. & Ad.* 861.

After the application refused upon affidavits, another application cannot be made upon additional affidavits.

AFTER a rule for a criminal information was discharged, an application was made for another criminal information against the defendant for the same matter, and in support of the second application the affidavit of the prosecutor was produced, used on a former occasion, and also other additional affidavits in confirmation of it.

Per Cur.—We consider we have not the power to receive this second application. It would be dangerous to do so, as it would establish a precedent for a second inquiry in every case where a rule nisi for a criminal information had been discharged.

REX *v.* COCKSHAW, M. T. 1833. K. B. 2 *N. & M.* 378.

An affidavit must shew in what county it is sworn.

ON shewing cause against a rule for a criminal information, the affidavits on the part of the prosecution were objected to, as being defective in point of law. When they are sworn before commissioners it should appear in the jurat at what place they were sworn; and as, in the present case, the affidavits were sworn before commissioners, and it did not appear in what place they were sworn—

The Court said that the objection was a fatal one; and that there being commissioners appointed for the several counties, it ought to appear at what place the affidavit was sworn, by which a medium is offered to the Court of referring to their records, and ascertaining that the person taking it is a person having proper jurisdiction for that purpose.

See ante, tit. Affidavit.

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4. *Pleadings connected with.*

ATTORNEY-GENERAL *v.* CARPENTER, E. T. 1831. Ex. 1 *C. & J.* 409; S. C. 1 *Tyrw.* 351.

To a criminal information, the defendant may plead in person.

ON a criminal information, the defendant, having been served with a notice to plead, applied at the office to be allowed to plead, and was informed that he could only plead in person by order of the Court.

Per Cur.—We must grant the application; however, he may as well hand over the plea to the officer in Court now.

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5. *Evidence connected with.*

REX *v.* YOUNGHUSBAND, E. T. 1835. K. B. 4 *N. & M.* 850.

The evidence must clearly connect the de-

UPON a motion for a criminal information against A. for challenging B., an affidavit,—stating that, in a correspondence between them, A. had intimated an intention, after the settlement of accounts

between himself and B., to require an apology for offensive expressions contained in a letter received by him from D., or "such satisfaction as is usual on such occasions between gentlemen;" and that afterwards C., a relation of A., came with a letter of B. in his hand, settled the account by paying a balance due from A. to B., and, after saying that he had come in consequence of the letter in his hand, delivered a hostile message as from A.

fendant with the charge of sending a challenge.

The Court held the circumstances insufficient to connect A. with the challenge, and therefore refused the rule against A.; but granted a rule nisi against C.

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6. *Judgment on.*

REX *v.* O'GORMAN MAHON, E. T. 1834. K. B. 4 *Ad. & E.* 576.

A DEFENDANT being brought up for judgment for an assault, and it appearing that the prosecutor had commenced an action which was still depending for the same assault—

Where an action is pending for an assault, the Court will not pass judgment.

The Court refused to pass any judgment, except that the defendant should give security for his good behaviour for having used violent language towards the prosecutor in addressing the Court; and this, although, at the time of the defendant being brought up, the prosecutor offered to discontinue the action.

II. RELATIVE TO INFORMATION FOR PENALTIES.

(*a*) WHEN IT LIES.

ATTORNEY-GENERAL *v.* KENNIFECK, T. T. 1837. Ex. 2 *M. & W.* 715.

UPON an information under 6 Geo. 4, c. 108, s. 45, for assisting and being concerned in the unshipping tobacco into Ireland, the duties not having been paid, the defendant being proved only to have hired the vessel in England, but to have taken no part in the offence subsequently committed—

Under 6 Geo. 4, c. 108, merely hiring the ship does not make such party liable.

The Court held, that he was guilty of no offence described in the act for which he was triable in England.

ATTORNEY-GENERAL *v.* PEMBERTON, M. T. 1824. Ex. 1 *M'Clel.* 634.

THE stat. 35 Geo. 3, c. 114, gives the maker of common glass bottles, &c., the option of being charged with the duty either according to the weight of the materials, ascertained by the gauge thereof in the pots, or by weighing the bottles, &c., when made; but, in case of his electing the latter mode, requires him to deliver to the officer of excise a declaration in writing to that effect. In an information for penalties on that statute, and others in pari ma-

A defendant, by allowing a particular course to be pursued in his factory as to duties to be paid, may be estopped from

disputing such mode*.

teriâ, containing counts for using false scales and weights, and counts for obstructing an officer in weighing glass—

The Court held, it was necessary to aver in the information the delivery of the declaration, and to give evidence of that fact; but the production of the instrument itself may be dispensed with, and its existence may be presumed from the defendant's being charged with, and paying the duty for six years, by weighing the bottles and other vessels. After that time, he must be presumed to have made his election in the mode of paying the duty.

(*b*) Against whom it lies.

Attorney-General *v.* Riddle, E. T. 1832. Ex. 2 *C. & J.* 493; S. C. 2 *Tyrw.* 523.

On an information for an illegal removal of exciseable articles by the wife, it is for the jury to say, whether it was done by the husband's authority.

The wife of a paper-maker, who acted in her husband's business during his absence, by giving notices to charge and weigh, and also occasionally by paying paper-duty to the collector, raised money upon paper which had no wrapper or label, and no impression or stamp on it. It was proposed to give certain acts of the wife in evidence in order to fix the husband with the improper removal of paper. It was stated that, some duties being in arrear, the wife had called at the house or shop of a neighbour with a quantity of paper which had been illegally removed from the manufactory, and that she was desirous of borrowing money upon the deposit of it. The money was lent, and the paper accordingly deposited; and it was stated by the Attorney-General, that he should prove that, on the same day, the duties then due were paid by the wife; that evidence was rejected, as not being evidence proper to charge the husband with the acts of the wife.

The Court held, that it was for the jury to decide, whether the wife acted under the authority of the husband; and, consequently, that evidence of her acts, in respect of pledging the paper, was improperly rejected.

Attorney-General *v.* Tomsett, E. T. 1835. Ex. 2 *C., M. & R.* 170; S. C. 5 *Tyrw.* 514.

Goods being seized in the possession of the master of a vessel employed by the defendant is sufficient evidence of the master's agency to make the defendant liable.

The information charged the defendant as assisting and otherwise being concerned in unshipping uncustomed goods; and, in the second count, that certain goods which had been unshipped without payment of the duties had come into the hands and possession of the defendant, he well knowing that they had been so illegally unshipped. It was proved that the goods were transferred from a boat in the Downs, a mile or two from the shore, within the limits of the port of Dover, into a hoy hired by the defendant at that port for the purpose of receiving them, and were brought into the Thames, and seized in the port of London.

The Court held, that the information was proved by the evidence,

* Wines imported by an ambassador duty free are subject to duty on being sold by him; and the agent selling them may be sued for money had and received, or for money had and received to the use of the Crown, for the amount of the duty. (*Attorney-General* v. *Thornton*, M. T. 1824, Ex., 1 M'Clel. 600; abr., ante, tit. *Ambassador*, Vol. 1, p. 155).

since it established that either the defendant was concerned at Dover in the unshipping of the goods, or that, when the master of the hoy brought them into the port of London, he being the defendant's agent, the latter was properly charged as having them in possession within the United Kingdom.

(*c*) Relative to the form of*.

Rex *v.* Morley, H. T. 1827. Ex. 1 *Y. & J.* 221.

An information in the disjunctive is bad.

The allegation in one count of the information upon which, at the trial, the verdict was taken, was, that the defendant imported, or caused to be imported, certain foreign silks. On motion in arrest of judgment—

Per Cur.—The judgment must be arrested on the ground, that the allegation being in the alternative, "that he imported or caused to be imported," was uncertain and bad, inasmuch as it does not appear with what offence the defendant was charged.

Attorney-General *v.* Dyer, E. T. 1834. Ex. 2 *C. & M.* 664.

Must be certain in describing the act omitted to be done.

A count on an information for a penalty of 100*l.* against a maltster, founded on sect. 1 of cap. 52, and sect. 18 of cap. 53, of 7 & 8 Geo. 4, charged, that the defendant did make use of a cistern for the making of malt without having made a true and particular entry thereof in writing with the officer of excise, in whose survey such cistern was intended to be used.

The Court held the information insufficient, because it must be certain in describing the act omitted to be done.

Attorney-General *v.* Greaves, M. T. 1835. Ex. 2 *C., M. & R.* 669; S. C. 1 *Tyrw. & G.* 48.

Goods prohibited from being imported by reason of the place from which they are brought, are properly described as uncustomed goods†.

An information on the 3 & 4 Will. 4, c. 53, s. 44, alleged that the defendant, between the 1st December, 1833, and the 11th January, 1834, at &c., was assisting and otherwise concerned in the unshipping from a certain vessel divers goods, to wit, 2196 pounds weight of foreign nux vomica, of the value &c., and 1626 pounds weight of foreign coculus indicus, of the value &c., amounting together to the value &c.; the said nux vomica and coculus indicus being then and there liable to the duties of customs, the said duties of customs for the same not having been first paid or secured, contra formam statuti, whereby he had forfeited &c.

Per Cur.—The 44th section shews that the importation of these goods was liable to a penalty; but an ambiguity arises on the use of the words "prohibited goods." That is removed if you look at the whole of the 30th section, which relates to the recovery of the penalty. That was enacted to avoid the inconvenience which resulted from

* The subpœna upon an excise information returnable immediately may be tested in vacation. (*Attorney-General* v. *Jenkins*, 12 Price, 69).

The commencement of an information for penalties, with reference to the limitation of time for bringing it, is to be taken from the issuing of the process, and not actual filing of the process. (*Attorney-General* v. *Hall*, 11 Price, 760).

† In an information under 21 Geo. 3, c. 37, the number of articles seized is material. (*Attorney-General* v. *Jefferys*, E. T. 1824, Ex., 1 M'Clell. 270).

The Attorney-General v. *Key*, (post, p. 283), with which we are not disposed to dispute. By the language there used, the goods in that case were brought within the title of "prohibited goods." The difficulty which there occurred is removed by the present section. It says, that goods which are within a certain predicament shall be described as goods liable to payment of duties for the purpose of recovering the penalty; and the object of the legislature was to say, that the mode of information shall be in like manner as if the goods had been imported without payment of duty. It appears to us, substantially, that the information is correct, describing the goods as uncustomed goods.

REX *v.* EVERETT, E. T. 1828. K. B. 8 *B. & C.* 114; S. C. 2 *M. & R.* 35.

An information, under 6 Geo. 4, c. 168, s. 34, must shew that the party solicited to forbear was a person authorized to seize.

AN information, under 6 Geo. 4, c. 108, s. 34, stated, that one R. H. was employed in the service of the customs, and that it was his duty, as such person so employed, to seize certain goods; and it then went on to charge the defendant with offering to bribe R. H. to violate his duty. After verdict—

The Court held, the mere employment of R. H. by the customs did not create a duty to seize goods; and none of the acts of Parliament relating to the customs creating such a duty from such an employment alone, judgment was arrested.

See Man v. *Roberts*, 12 *East*, 89.

REX *v.* PEREIRA, E. T. 1835. K. B. 2 *Ad. & E.* 375.

The conviction must clearly shew the offence of which the defendant has been convicted.

THE conviction upon an information on 3 & 4 Will. 4, c. 53, against a foreigner for being on board a vessel liable to forfeiture, charged the offence as being so within a port of the United Kingdom, and within one league of the Court.

The Court held, that, as to the latter, the penalty being done away with, the conviction could not be supported, not distinctly shewing the defendant which offence was insisted on against him.

(*d*) RULE TO REPLY.

REX *v.* SLEE, T. T. 1825. Ex. 1 *M. & Y.* 361.

An application must be made to the Attorney-General to reply before a rule will be granted for that purpose.

A PLEA to an information had not been replied to. On motion for a rule calling on the Attorney-General to put in a replication,

The Court declined granting the order in the present stage, directing an application to be made to the Attorney-General for the purpose stated, in the first instance.

(*e*) EVIDENCE CONNECTED WITH*.

ATTORNEY-GENERAL *v.* HAWKES, M. T. 1830. Ex. 1 *C. & J.* 121; S. C. 1 *Tyrw.* 3.

No variance on an information

AN information on the 6 Geo. 4, c. 108, s. 35, for offering a bribe to a custom-house officer to induce him to neglect his duty,

* The officer of the Queen's remembrancer is bound to produce an affidavit filed in the office. (*Attorney-General* v. *Bond*, M. T. 1839, N. P., 9 C. & P. 189).

stated the officer's name to be Thomas Dabbs. At the trial his name was proved to be Thomas Tyrrell Dabbs; but it was also proved that he was better known, and particularly as such officer, by the name of Thomas Dabbs.

for offering bribes, that the custom-house officer's name was mis-stated, it being the name he was usually called by.

Per Cur.—The officer is called in the information Thomas Dabbs, but it appears that his name is Thomas Tyrrell Dabbs. As soon as this appeared, it was contended that the information must fail, because the bribe was stated to have been offered to Thomas Tyrrell Dabbs. It is manifest that if a bribe was offered at all to a custom-house officer to neglect his duty, it was indifferent whether his name was Thomas Dabbs or Thomas Tyrrell Dabbs; yet, upon the subject, considerable strictness has prevailed: the object of this strictness is to guard against the accused being misled as to the charge against him—that he may know of what offence he is accused, and may come prepared to defend himself if he can. The object of this rule explains and construes it. If, therefore, it is the name by which the party meant to be pointed out as known, that is sufficient, though it may not be his name of baptism.

ATTORNEY-GENERAL *v.* KEY, M. T. 1830. Ex. 1 *C. & J.* 159; S. C. *in error*, 2 *C. & J.* 2.—S. P. ATTORNEY-GENERAL *v.* BELL, 1 *Tyrw.* 52.

AN information, under the 6 Geo. 4, c. 107, charged that the defendants did knowingly harbour, keep, and conceal certain goods liable to the payment of duty on the importation thereof, which had been then and there imported and illegally unshipped, the duties thereon not having been first paid or secured; that is to say, 500 lbs. weight of tobacco, &c., and 400 gallons of foreign brandy, whereby &c., concluding for the penalty.

Harbouring goods is not shewn by the mere receipt of goods, which, from the quantities in which they were packed and unpacked, were expressly prohibited.

The Court held, that the information was not supported by evidence of the importing and harbouring of foreign tobacco in packages containing 28 lbs. weight each, and foreign brandy in casks containing four gallons each, for such goods are prohibited by stat. 6 Geo. 4, c. 107, and ought therefore to have been described in the information.

(*f*) DEMURRER CONNECTED WITH*.

(*g*) PUTTING OFF TRIAL†.

(*h*) OF THE VERDICT‡.

* A demurrer to a plea to an information is not within the rule requiring matters of law to be stated in the margin, but it must be signed by the Attorney-General before it is delivered. (*Rex* v. *Woollet*, E. T. 1835, B. C., 3 D. P. C. 694).

† The postponement of the trial of an information on proper grounds is not to be considered as a matter of favour. (*Attorney-General* v. *Gatcliffe*, T. T. 1823, Ex., 12 Price, 367). Affidavit to postpone trial of information on ground of absence of a material witness, must state where he is. (*Attorney-General* v. *Phillips*, E. T. 1824, Ex., 1 M'Clell., 251; S. C. 13 Price, 522.)

‡ Where the penalty is to be double the sum for which the party is deficient, the finding of the jury is to be taken as the single amount. (*Attorney-General* v. *Hatton*, E. T. 1824, Ex., 1 M'Clell. 214).

III. RELATIVE TO OTHER INFORMATIONS.

ATTORNEY-GENERAL *v.* BROOKSBANK, M. T. 1827. Ex. 2 *Y. & J.* 37.

Upon an information against an army-agent, as to his accounts, the Court will order the War-Office to produce documents.

UPON an information under 43 Geo. 3, c. 58, s. 25, against an army-agent for a discovery of accounts, to which he pleaded a settled account by clearing warrants; which being overruled, on the ground that the warrants did not amount to a final settlement, he moved to amend his plea, and, for that purpose, that the Attorney-General or the Secretary of War might be ordered to produce the vouchers, &c., rendered annually by the defendant during the period stated in the plea, and deposited at the War-Office; and which were sworn to be material to the defence, the discovery sought relating to transactions during ten years, and the last of which occurred twenty-five years ago—

The Court, under the circumstances, ordered the proceeding on the informations to be stayed until the documents sought should be procured.

Informer. See tit. *Penal Statutes.*

Inhabitant. See tit. *Witness.*

Initials. See tits. *Arrest—Bail—Bills and Notes.*

Injunction*. See also, tit. *Execution.*

Inn and Innkeeper.

I. RELATIVE TO THE LICENSING, p. 285.

II. RELATIVE TO THE RIGHTS OF AN INNKEEPER.

(*a*) OF HIS LIEN, p. 285.

(*b*) TO REMOVE PERSONS FROM HIS HOUSE, p. 285.

III. RELATIVE TO THE DUTIES OF, p. 286.

* Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the Court refused to stay proceedings against them in an action in which the debt was not admitted, observing, that the injunction might be a ground for applying to stay execution. (*Davis* v. *Salter*, E. T. 1832, Ex., 2 C. & J. 466; S. C. 1 D. P. C. 561).

IV. RELATIVE TO THE LIABILITIES OF, p. 286.

V. RELATIVE TO MUSICAL ENTERTAINMENTS, p. 287.

VI. RELATIVE TO ACTIONS BY AND AGAINST, p. 287.

I. RELATIVE TO THE LICENSING.

REX *v.* JUSTICES OF MIDDLESEX, M. T. 1832. K. B. 3 *B. & Ad.* 938.

The right to appeal, under 9 Geo. 4, c. 61, s. 27, is in a party *immediately*, not consequentially, aggrieved.

IN this case the Court held, that the words in the 9 Geo. 4, c. 66, s. 27, "think himself aggrieved," mean a person immediately aggrieved, as, by refusal of a license to himself, by fine, &c., and not one who is only consequentially aggrieved; and therefore, that where magistrates had granted a license to a party to open a public-house not before licensed, within a very short distance of a licensed public-house, the occupier of the latter house could not appeal against such grant.

II. RELATIVE TO THE RIGHTS OF AN INNKEEPER.

(*a*) OF HIS LIEN.

SUNBOLF *v.* ALFORD, T. T. 1837. Ex. 3 *M. & W.* 248.

An innkeeper cannot detain the person of his guest until payment of his bill*.

IN trespass against an innkeeper—

The Court held, that an innkeeper, although he has a lien on the goods, has none on the person of his guest, and cannot therefore detain him for any reckoning due; still less has he any right to take any of his clothes off his person, as a security for the same.

(*b*) TO REMOVE PERSONS FROM HIS HOUSE†.

* In trespass for taking carriage horses, which the plaintiff had hired of the defendant to take him away from the defendant's inn, the defendant pleaded, that the plaintiff refused to pay his bill for entertainment, and that the defendant did so to prevent the removal of the plaintiff's carriage. To this plea the plaintiff replied, that he had "tendered" the defendant 45*l.*; and the defendant, denying the tender, it was proved that the plaintiff put down the money and offered it, if the defendant "would take it in full of the bill:"—Held, that this was not a valid tender, and that this evidence did not support the replication:—Held, also, that on these pleadings the jury are not to consider the reasonableness of the defendant's bill. (*Gordon* v. *Cox*, 1835, N. P., 7 C. & P. 172). An innkeeper has a lien on the goods of his guest for the amount of his bill, and even for money lent, if advanced upon an agreement that they should be a security; and the 24 Geo. 2, c. 40, s. 12, does not apply to the case of spirits supplied to a guest in an inn. (*Proctor* v. *Nicholson*, T. T. 1835, N. P., 7 C. & P. 67). But an innkeeper has no lien on a horse placed in his stable for the amount of its keep, unless it be placed there by a guest. If a person is stopped with a horse under suspicious circumstances, and the horse be placed at any inn by the police, the innkeeper has no lien on the horse for its keep; and if an auctioneer, by the direction of the innkeeper, sell the horse for its keep, he is liable to be sued in trover by the owners of the horse. (*Binns* v. *Pigot*, T. T. 1840, N. P., 9 C. & P. 208).

† If a person conducts himself in a disorderly manner in a public-house, and the landlord requests him to depart and he refuses to do so, the landlord is jus-

III. RELATIVE TO THE DUTIES OF*.

IV. RELATIVE TO THE LIABILITIES OF.

KENT *v.* SHUCKARD, M. T. 1831. K. B. 2 *B. & Ad.* 803.

An innkeeper's liability is the same for money as goods†.

THE plaintiff and his wife, together with a young lady (the witness in the cause), arrived at Brighton in the evening, and a reticule was then produced by the plaintiff's wife containing bank-notes and cash, at that time amounting to 5*l*. They took a sitting-room and two bed-rooms, one of which was adjoining to, and opening into, the sitting-room. On the next day Mrs. K. went into the bed-room, and laid the reticule, which contained the money, on the bed; but afterwards, thinking that she heard her husband coming to the sitting-room, she left the bed-room to join him, at the same time leaving the door between that and the sitting-room open. A little while afterwards she sent the witness for her reticule, but it was not to be found. The plaintiff had a verdict. On motion for a new trial—

Per Cur.—We never have heard of any distinction existing between money and other goods; the responsibility is the same in both cases. The principle upon which an innkeeper's liability for the loss of the goods of his guests which have been stolen rests, is, both by the civil and at the criminal law, in order to prevent the possibility of collusion with the thief.

JONES *v.* TYLER, T. T. 1834. K. B. 3 *N. & M.* 576; S. C. 1 *Ad. & E.* 522.

If an innkeeper places his cus-

IN an action on the case against an innkeeper, it appeared that the plaintiff drove up to an inn in a horse and gig, and the horse

tified in laying hands on him to put him out; and if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault; and if it is seen by a peace officer, he is justified in taking the person into custody. So, if a person, without committing any assault, make such noise or disturbance in a public-house as would create alarm, and disquiet the neighbourhood and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace officer, provided that this had occurred in the presence of the officer. (*Howell* v. *Jenkson*, 1834, N. P., 6 C. & P. 723).

* An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time; and it is not necessary for the guest to tender the price of his entertainment, if his objection is not on that ground; and it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist on knowing those particulars; but if the guest come to the inn drunk, or behave in an indecent or improper manner, the innkeeper is not bound to receive him. (*Rex* v. *Ivers*, 1835, N. P., 7 C. & P. 213).

† The contract entered into by a booking-office keeper (the office being attached to an inn), who takes in parcels to be forwarded by carriers, is only to deliver safely to a carrier. (*Gilbert* v. *Dale*, 1 N. & P. 22; S. C. 6 Ad. & E. 543). An admission by an innkeeper that he left money, entrusted to him for the purpose of taking up a bill, in his cash box in his tap-room, where it was lost, together with a much larger sum of his own, is evidence of gross negligence to go to a jury. (*Doorman* v. *Jenkins*, M. T. 1834, K. B., 4 Nev. & M. 170).

was taken out by the ostler, in the presence of the guest, and put into the inn stable. The gig was left in a yard which was an open carriage-way communicating with the public road, and on the other side of the way from the inn, forming no part of the premises belonging to the inn, but used by the innkeeper for placing the carriages of his guests there. It being stolen from thence—

tomer's carriage on the highway, he is answerable for the loss thereof.

The Court held, that, although this was a case very near the limits of the innkeeper's responsibility, still he was liable.

RICHMOND *v.* SMITH, E. T. 1828. K. B. 8 *B. & C.* 9; S. C. 2 *M. & R.* 235.

THE servant of an innkeeper was about to remove the luggage of a guest to his bed-room, and the guest desired that a carpet-bag (part of his luggage) should be left in the room of the inn, called the Commercial Room, which was done accordingly, and the bag was afterwards stolen from that room. The Lord Chief Baron was of opinion, that the defendant, to relieve himself from liability, should have objected to the bag remaining in the Commercial Room, and have given the plaintiff notice that if he persisted in having it to remain, it must be at his own risk; and that a notice from an innkeeper to discharge himself from his liability at common law should be as distinct as that which was required from a carrier. The jury having found a verdict for the plaintiff, on motion for a new trial, on the ground of misdirection—

And an innkeeper is not absolved from liability for the luggage of a guest, because he put it into a particular room at the request of the latter.

Per Cur.—We are of opinion there was no misdirection. The innkeeper is primâ facie liable; if the guest refused to let the things be under the innkeeper's care, the risk will be his own. But in this case he did not do so; he desired the bag to be left in the Commercial Room, and neither the innkeeper nor his servant objected to this.

V. RELATIVE TO MUSICAL ENTERTAINMENTS*.

VI. RELATIVE TO ACTIONS BY† AND AGAINST.

WILLIAMS *v.* GESSE, E. T. 1837. C. P. 3 *Bing. N. S.* 849; S. C. 5 *Scott*, 56; S. C. 7 *C. & P.* 777.

A BOX was sent by A. to an inn kept by B., who booked parcels for carriers, but did not receive any thing for so doing. The person

Trover does not lie against an

* Where the defendant, a tavern-keeper, had a room for a public entertainment of music, to which persons were admitted at 2*d.* a head, without a license under 25 Geo. 2, c. 36:—Held, that he was liable to the penalty, whether he received it for his own benefit, or for others, and however respectable the persons frequenting it might be; and that the 13th section applied to common informers. (*Green* v. *Botheroyd*, M. T. 1828, N. P., 3 C. & P. 471). If the room be continually used for the purpose of music and dancing, it will be for the jury to say whether it is not kept for those purposes. (*Gregory* v. *Tavernor*, M. T. 1833, N. P., 6 C. & P. 280). But to bring a case within the 25 Geo. 2, c. 36, (against unlicensed houses), it is not necessary that the room should be used exclusively for the purpose of music and dancing, nor that money should be taken for admission; and the not having written up outside the house that it was licensed, is primâ facie evidence of its being unlicensed. (*Gregory* v. *Tuffs*, M. T. 1833, N. P., 6 C. & P. 271).

† A publican cannot recover for beer, &c., furnished to third persons by order of a party who has been allowed to become previously intoxicated; the permit-

innkeeper for goods lost by him.

who took the box told B. to keep it till A. called for it, to which B. answered "very well." On A.'s calling for it the box was missing, and B. said he supposed some carrier had taken it by mistake. In an action of trover by A. against B.—

The Court held, that, however the innkeeper might be liable for negligence, trover could not be maintained.

Inns of Court. See tits. *Barristers—Mandamus.*

Inquiry, Writ of.

I. RELATIVE TO, WHEN IT IS OR IS NOT REQUISITE, p. 288.

II. RELATIVE TO ASSESSING DAMAGES UNDER 3 & 4 Will. 4, c. 42, s. 16, p. 289.

III. RELATIVE TO THE NOTICE OF, p. 289.

IV. RELATIVE TO THE EXECUTION OF, p. 290.

V. RELATIVE TO THE EVIDENCE, p. 290.

VI. RELATIVE TO THE DAMAGES, p. 290.

VII. RELATIVE TO THE COSTS, p. 291.

VIII. RELATIVE TO THE RETURN OF, p. 291.

IX. RELATIVE TO THE INQUISITION, p. 291.

X. RELATIVE TO THE JUDGMENT AND EXECUTION, p. 292.

XI. RELATIVE TO A REFERENCE ON, p. 292.

XII. RELATIVE TO THE STAYING OF, p. 292.

XIII. RELATIVE TO A SECOND WRIT, p. 292.

I. RELATIVE TO, WHEN IT IS OR IS NOT REQUISITE*.

Weald *v.* Brown, T. T. 1832. Ex. 2 *C. & J.* 672.

An inquiry is not essential in

On a rule to shew cause why final judgment by default and all subsequent proceedings should not be set aside, on the ground that

ting persons to become so in his house being illegal, he cannot take advantage of an offence to which he has been instrumental. (*Brandon* v. *Old*, E. T., 1828, N. P., 3 C. & P. 440).

* Where a plaintiff has obtained a judgment non obstante veredicto, he may execute a writ of inquiry without leave of the Court. (*Shephard* v. *Halls*, 2 D.

the judgment had been signed without any writ of inquiry. The affidavit stated that the action was in debt for the amount of an apothecary's bill.

debt, unless it appear clearly that the amount must, from the nature of the contract, be uncertain.

Per Cur.—If, from the nature of the contract, the amount of necessity be uncertain, then in an action of debt, as well as in other actions, there must be a writ of inquiry to reduce it to a certainty. There is nothing before the Court to shew that in this action the debt was of such a nature as to require a writ of inquiry to ascertain its precise amount. It is impossible for us to say, without any thing to shew that the declaration was so framed as to render a writ of inquiry essential, that the judgment, for the want of it, was irregular.

II. RELATIVE TO ASSESSING DAMAGES UNDER 3 & 4 WILL. 4, c. 42, s. 16*.

III. RELATIVE TO THE NOTICE OF†.

REG. GEN., T. T. 1832. C. P. 8 *Bing.* 466; S. R. 1 *M. & Scott*, 415.

BY Rule, it is ordered that the days between Thursday next before and the Wednesday after Easter-day, shall not be reckoned in any rules or proceedings, except notices of trial and writs of inquiry.

The Easter holidays do not apply to writs of inquiry.

P. C. 453). Where a defendant has suffered judgment by default in an action for calls on shares in a railway company, on which interest is also claimed, pursuant to the provisions of the act of Parliament, the Court will not grant a rule to compute, but will direct a writ of inquiry to be executed. (*Cheltenham and Great Western Railway Company* v. *Fry*, E. T. 1839, B. C., 7 Dowl. P. C. 616).

* The 3 & 4 Will. 4, c. 42, s. 16, after reciting that it would also lessen the expense of trials and prevent delay, if such writs of inquiry as hereinafter mentioned were executed, and such issues as hereinafter mentioned were tried before the sheriff of the county where the venue is laid, enacts, "That all writs issued under and by virtue of the statute passed in the session of Parliament held in the eighth and ninth years of the reign of King William the Third, intituled 'An Act for the better preventing frivolous and vexatious Suits,' shall, unless the Court where such action is pending, or a judge of one of the said superior courts shall otherwise order, direct the sheriff of the county, where the action shall be brought, to summon a jury to appear before such sheriff, instead of the justices or justice of assize or nisi prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the Court from whence the same shall issue, at a day certain in term or in vacation, in such writ to be mentioned, and such proceedings shall be had after the return of such writ, as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or nisi prius."

† When plaintiff in pleading concludes to the country, and issue is not joined, and plaintiff signs judgment for want thereof, the notice of trial on such issue shall operate with regard to him as notice of writ of inquiry. (H. T. 2 Will. 4). Such notice, and of continuance of inquiry, shall be given in town, but countermand of the notice may be given in town or country, unless otherwise ordered by the Court or judge. (H. T. 2 Will. 4). If the venue in declaration be laid in London or Middlesex, and the defendant live within forty miles from London, eight days' notice must be given, one inclusive and the other exclusive, and the same if venue is laid in any other county; but if defendant reside above forty miles from town, and venue laid in London or Middlesex, fourteen days' notice must be given, and Sunday is reckoned one, unless the last. (M. T. 4 Anne). If under

WATSON *v.* DELCROIX, H. T. 1834. Ex. 2 *C. & M.* 425; S. C. 2 *D. P. C.* 396; S. C. 4 *Tyrw.* 266.

In some cases personal service will be dispensed with.

IN this case, the Court allowed notice of a writ of inquiry to be served by sticking it up in the office, and leaving it at the defendant's last place of abode, though neither the process nor notice of declaration had been personally served.

BROOKS *v.* TILL, E. T. 1828. Ex. 2 *Y. & J.* 276.

In Exchequer notice of inquiry should be given to the attorney, and not to the defendant personally*.

BY Rule 39 Geo. 3, it is ordered, that all notices of trial, and of the execution of writs of inquiry, be given by the attornies, or side clerks of the office of pleas in this Court, in causes instituted there, and be entered in the book of orders kept in such office; and a written notice of all such entries shall be left at the seal in the said office of the attornies or clerk in court concerned for the defendant, or at his chambers or place of residence. The notice to execute the writ of inquiry had been served upon the defendant personally.

Per Cur.—This service will not do; it should have been served on the attorney or his clerk.

IV. RELATIVE TO THE EXECUTION OF†.

V. RELATIVE TO THE EVIDENCE‡.

VI. RELATIVE TO THE DAMAGES§.

terms to take short notice, then four days in country causes, (M. T. 2 Will. 4), and two in town must be given; but being under terms to take short notice of trial does not bind defendant to take short notice of inquiry. (2 Dowl. P. C. 355). When a term's notice of inquiry is required, it may be given at any time before the first day of term. (M. T. 2 Will. 4).

* Notice of executing a writ of inquiry need not be signed by a clerk in court, nor served on the defendant's attorney, or clerk in court, but it is sufficient if left at the last and most usual place of defendant's abode. (*Knibbs* v. *Hopcraft*, 10 Price, 147).

† Where, upon a writ of inquiry, in an action for work &c., the undersheriff refused to allow the defendant to ask, on cross-examination, whether part had been done on his retainer:—Held, that he was entitled to put the question; the judgment by default admits something to be due, but disputes the amount. (*Williams* v. *Cooper*, M. T. 1834, Ex., 3 D. P. C. 204). Where it appears that a common jury is improper to assess damages on a writ of inquiry before the sheriff, the Court will direct the sheriff to summon a jury to be taken from the special jury-book. (*Price* v. *Williams*, T. T. 1836, Ex., 5 D. P. C. 160).

‡ Upon a writ of inquiry after judgment by default, or on demurrer, evidence contradicting the facts stated in the declaration:—Held inadmissible, although it would have been admissible on the general issue. (*Stephens* v. *Pell*, 2 D. P. C. 629; S. C. 2 C. & M. 421). Minutes of what passed before undersheriff not admissible unless verified by affidavit. (*Lothbury* v. *Brown*, 10 Moore, 106).

§ In assumpsit with a special count for payment of a specific sum on an agreement, and judgment by default:—Held, that the plaintiff was entitled to a verdict for that sum, without any evidence of damage, but that it should be entered on that count, and nominal damages only on the others. (*King* v. *Beak*, T. T. 1840, Ex., 8 D. P. C. 735).

VII. RELATIVE TO THE COSTS.

WILKINSON *v.* MALIN, M. T. 1832. Ex. 1 *C. & M.* 237; S. C. 1 *D. P. C.* 630.

The having a good jury being now in the discretion of the Court, the costs of it should be allowed on taxation.

ON motion for the Master to review his taxation, one item objected to was a charge for a good jury upon the execution of a writ of inquiry. The Master certified to the Court, that, since the Rule 101, Hil. Term, 2 Will. 4, the practice had been to allow those costs.

Per Cur.—Since that Rule, the granting such a jury is now entirely in the discretion of a Judge.—Rule discharged as to the above item.

PORTER *v.* COOPER, E. T. 1835. Ex. 2 *C., M. & R.* 232; S. C. 3 *D. P. C.* 662.

Where, between a first and second inquiry, the latter being granted for rejection of evidence, the defendant pays the debt, he is not liable for the costs of the first inquiry.

THE Court had set aside a writ of inquiry, and awarded a fresh writ, in consequence of the rejection of evidence tendered by the defendant, who, instead of going down to a second assessment of damages, paid the whole amount of the verdict. Upon this state of facts the Master allowed to the plaintiffs the costs of that inquiry.

Per Cur.—The payment by the defendant does not take this case out of the general rule. *Jackson* v. *Hallam*, (2 B. & Ald. 317), has made one exception, but it is distinguishable from the present case, because the defendant was bound to pay the costs of the first trial, whatever the result of the second might be.—Rule absolute; but as this was a mistake of the Master, without costs.

VIII. RELATIVE TO THE RETURN*.

IX. RELATIVE TO THE INQUISITION.

TOWNSEND *v.* BURNS, M. T. 1832. Ex. 1 *C. & M.* 177; S. C. 3 *Tyrw.* 104; S. C. 1 *D. P. C.* 629.

The plaintiff's attorney may be compelled to file the inquisition and subsequent proceedings.

THE defendant having suffered judgment by default, a writ of inquiry was executed before the sheriff of Middlesex, whereon judgment was signed, and the defendant taken in execution.

The Court will compel the plaintiff's attorney to file the inquisition upon a judgment by default, in order that the defendant may move in arrest of judgment, or to vacate the judgment and execution, and will make him pay the costs, if, on being applied to, he has refused to file the inquisition, and has not offered to give a copy thereof.

* Where a sheriff does not return in due time a writ of inquiry, the Court will compel him by rule so to do. (*Stockdale* v. *Hansard*, H. T. 1840, Q. B., 8 D. P. C. 297).

X. JUDGMENT AND EXECUTION*.

XI. RELATIVE TO A REFERENCE ON†.

XII. RELATIVE TO THE STAYING OF‡.

XIII. RELATIVE TO A SECOND WRIT§.

Inquisition.

See tits. *Compensation—Coroner—Execution—Inquiry, Writ of—Railways—Sheriff—Turnpike and Turnpike Roads.*

REG. *v.* SOUTH HOLLAND DRAINAGE, M. T. 1838. K. B. 1 *P. & D.* 79; S. C. 8 *Ad. & E.* 429.

A jury, on assessing compensation under

UNDER a local drainage act, a jury were impanelled to assess the compensation to be paid to the owner of a close for the purchase of the land, and the recompense for the damage to be sustained thereby.

* After the return of the writ of inquiry, judgment may be signed at the expiration of four days from such return; (H. T. 4 Will. 4); and by 1 Will. 4, c. 7, s. 1, on the expiration of the rule for judgment, execution may be issued forthwith, unless the sheriff or other officer before whom the writ was executed shall certify on such writ, that judgment ought not to be signed till defendant shall have had an opportunity to apply to the Court to set aside the execution of such writ, or one of the Judges shall order the judgment to be stayed until a day named in such order. Provided always, that, in case the signing of judgment on such writ shall be postponed by reason of such certificate or order, or by the choice of the plaintiff or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record as of the day of the return of such writ, unless the Court shall otherwise direct. The defendant may compel the plaintiff to file the inquisition, to enable the former to arrest or vacate judgment. (2 D. P. C. 629).

† Where, on the execution of a writ of inquiry, the parties agreed to withdraw the case from the jury, and to submit it to the Master under a Judge's order, the Master sits as an arbitrator appointed by the parties, and the Court will not interfere with his finding as to the facts. (*Fisher* v. *Pyne*, M. T. 1839, C. P., 1 M. & G. 265).

‡ The Court will not, at the instance of the sheriff, stay the execution of a writ of inquiry on a judgment by default, in an action for a libel, on the ground that the House of Commons has voted the libel to be a privileged publication, and that all persons concerned in bringing any action in respect of such publication are guilty of a breach of the privileges of that House. (*Stockdale* v. *Hansard*, M. T. 1839, B. C., 8 D. P. C. 148).

§ After judgment by default, and writ of inquiry executed, the Court, upon application, ordered a new inquiry, on the ground that, as to part of the damages found, there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand:—Held, notwithstanding, that he was not bound to pay the plaintiff the costs of the inquiry. (*Porter* v. *Cooper*, E. T. 1835, Ex., 3 D. P. C. 662). Where, on the execution of a writ of inquiry, in an action for slander, the jury are incorrectly informed by the undersheriff that any amount of damages will carry costs, and they find for less than 40*s.*, that is no ground for a new writ of inquiry, or for increasing the amount of the verdict. (*Grater* v. *Collard*, E. T. 1838, B. C., 6 D. P. C. 503).

A copy of the inquisition was then set out, which stated, that an inquisition was taken before the committee-men, upon the oaths of certain persons, who assessed the sum of 26*l.* as the sum to be paid for the purchase of the land, being the property or reputed property of George Prest, and which had been adjudged necessary to be taken for the purposes of the act, and for a recompense to him for the damages he might have sustained, which sum should be wholly paid to him; and that the committee-men should, moreover, at the expense of the drainage trust, plant quicksets on the land retained by the said G. Prest, four feet distant from the edge of the land purchased and taken by the said committee-men, and fix a post and shire-rail fence for its protection, and use due means for the next seven years to prevent the same from being injured by cattle.

The Court held, that such latter direction did not avoid the inquisition, it not appearing that any less compensation had been awarded on that account.

der an act of Parliament for land taken, do not render the inquisition void by directing some act to be done by the party beyond assessing the sum to be paid*.

REX *v.* SOUTH HOLLAND DRAINAGE, M. T. 1838. K. B. 1 *P. & D.* 79; S. C. 8 *Ad. & E.* 429.

ON motion for a writ of certiorari, to bring up an inquisition under a local act, at the instance of a party who had waived the regular notice to treat, and allowed the inquisition to be taken before the proper time, and who had allowed the calculations to be taken for the compensation in a mode not authorized by the act, and knew that the award was to be in that mode, and who had represented land to be his own freehold which he afterwards asserted to be copyhold.

The Court refused the writ.

A party who expressly waives notice cannot afterwards object to its omission in the inquisition itself.

Insolvent†.

I. RELATIVE TO THE MEANING OF THE WORD "INSOLVENT," AND CONSTRUCTION OF THE 7 GEO. 4, p. 299.

II. RELATIVE TO THE PERSONS WHO ARE OR ARE NOT ENTITLED TO THE BENEFIT OF THE ACT, p. 300.

* Where the inquisition alleged the offence on a day not arrived, by mistakingly using the words "year aforesaid," it was quashed. (*Rex* v. *Mitchell*, 1837, N. P., 7 C. & P. 800). A coroner's jury had found that the death of A. was occasioned by means of a locomotive engine of B. being driven against him, and that the same did "feloniously cast to the ground" the said A.:—Held not a sufficient description of the cause of the death of A. Some of the jurors being marksmen, and their marks not being attested, the inquisition was held bad on that ground also. (*Reg.* v. *Darlington Railway Company*, E. T. 1840, B. C., 8 D. P. C. 516).

† The statutes now in force with respect to insolvent debtors are the 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 39; and see 5 & 6 Vict. c. 116. It has been con-

III. RELATIVE TO THE PETITION, BEFORE 1 & 2 VICT. c. 110, p. 300.

IV. RELATIVE TO THE ASSIGNMENT, BEFORE 1 & 2 VICT. c. 110.

(*a*) OF THE PROVISIONAL ASSIGNMENT, p. 300.

(*b*) WHAT PASSES.

1. *In general*, p. 301.
2. *Chose in Action*, p. 301.
3. *Benefice*, p. 301.
4. *Copyholds*, p. 302.
5. *Legacies*, p. 302.
6. *Pension*, p. 302.
7. *Wife's Property*, p. 303.

(*c*) OF THE SALE UNDER, p. 303.

(*d*) EFFECT OF, p. 303.

sidered advisable to give an analysis of the sections of the statutes applicable to insolvents, and to abridge the leading cases decided on the prior statutes.

By 1 & 2 Vict. c. 110, sect. 7, Prisoners in custody on mesne process, who have not filed petitions under insolvent acts, entitled to be discharged.

Sect. 23. Power vested in the Court for relief of insolvent debtors continued for the purposes herein mentioned.

Sect. 24. Court now established, and commissioners and officers to be continued.

Sect. 25. Commissioners to hold their offices during good behaviour.

Sect. 26. But may be removed upon address.

Sect. 27. Court to be a court of record; seal of the Court; power of the Court and commissioners.

Sect. 28. Court to sit in the Court-house, in Portugal Street, and elsewhere, if necessary. One commissioner may hear matters out of Court upon summons.

Sect. 29. Court to sit twice a week. Power to regulate sittings otherwise during certain periods.

Sect. 30. Commissioners to make circuit. Power of commissioners on circuit.

Sect. 31. Time and manner of making circuit. Travelling expenses to be paid by the Treasury. One commissioner to remain in London. All commissioners may be on circuit if necessary.

Sect. 32. Time of circuits to be advertised. Commissioners not arriving, the Court to stand adjourned. Cause of non-arrival to be signified to Secretary of State.

Sect. 33. In case of illness of a commissioner, another may be appointed to execute the duties.

Sect. 34. No fees to be taken, except such as shall be established.

Sect. 35. Persons imprisoned for debt may apply to the Court in a summary way for discharge. Time of petitioning. What shall be stated in the petition to be signed and filed.

Sect. 36. Detaining creditors of prisoners in execution may apply by petition to Insolvent Debtors' Court for an order to vest debtor's estate in provisional assignee of Court.

Sect. 37. Prisoners' estate and effects, wearing apparel, &c., not exceeding 20*l.*, and future estate, to be vested in provisional assignee, by order of the Court.

Sect. 38. Prisoners within the walls only to petition, except in certain cases. Power to Insolvent Debtors' Court to direct prisoner to be discharged, on his finding sureties to attend at the time and place of hearing.

Sect. 39. Filing petition an act of bankruptcy, if acted upon within a certain time, in which case order avoided.

Sect. 40. Order to be filed, although avoided by commission of bankruptcy; and Court shall proceed to hear and adjudicate as in other cases. If insolvent

V. RELATIVE TO THE SCHEDULE, BEFORE 1 & 2 VICT. c. 110, p. 303.

VI. RELATIVE TO THE DETAINER, UNDER 1 & 2 VICT. c. 110, p. 305.

VII. RELATIVE TO THE RIGHTS OF THE ASSIGNEES, BEFORE 1 & 2 VICT. c. 110, p. 305.

VIII. RELATIVE TO PAYMENTS BY AND TO THE INSOLVENT, BEFORE 1 & 2 VICT. c. 110, p. 306.

IX. RELATIVE TO EXECUTIONS, BEFORE 1 & 2 VICT. c. 110, p. 308.

X. RELATIVE TO FRAUDULENT CONVEYANCE, BEFORE 1 & 2 VICT. c. 110, p. 308.

XI. RELATIVE TO THE DISCHARGE.

(*a*) BEFORE 1 & 2 VICT. c. 110.

1. *With reference to the Debts,* p. 310.

2. *With reference to particular Persons.*

1.—*As to Husband and Wife,* p. 312.

2.—*As to Principal and Surety,* p. 312.

3.—*Of Contracts not to oppose Discharge,* p. 313.

3. *As to Scotland,* p. 314.

4. *As to Wales,* p. 314.

(*b*) SINCE 1 & 2 VICT. c. 110, p. 314.

obtain his certificate, the rights of assignees afterwards to be the same as in other cases. Not to affect title of assignees of bankrupt, or operation of certificate.

Sect. 41. Prisoner not to be discharged for want of plaintiff's proceeding in his action.

Sect. 42. Provisional assignee to take possession of estate, &c., vested in him, and sell the same, if the Court directs, paying the expenses out of proceeds; to sue in his own name, if the Court directs. Property vested in him to go to his successor in office.

Sect. 43. Court may order an allowance to prisoner during his confinement, or for expense of schedule.

Sect. 44. Where prisoner is discharged out of custody, acts of assignees to be valid. No action to be brought against them where assignment is avoided.

Sect. 45. Power of Insolvent Debtors' Court to appoint assignees.

Sect. 46. Certified copy of order and appointment to be evidence. Proviso for registry.

Sect. 47. Sale of estate and effects to be made immediately. Creditors to meet thirty days before sale of real estate. Meeting to be advertised. Assignee may surrender or convey copyhold or customary estate.

Sect. 48. Discretion in Court as to the disposal of property in certain cases. Property may be mortgaged if more beneficial.

Sect. 49. Assignees may execute powers which the insolvent might have executed for his own benefit.

Sect. 50. Where lease accepted by assignees, the insolvent not liable for the rent. Assignees not determining whether to accept the lease, the lessor may apply to the Court.

Sect. 51. Assignees may sue in their own names; may make composition for

XII. RELATIVE TO ACTIONS BY AND AGAINST THE ASSIGNEES, BEFORE 1 & 2 Vict. c. 110.

(*a*) Parties, p. 315.

(*b*) Declaration, p. 315.

(*c*) Evidence, p. 315.

(*d*) Witnesses, p. 317.

(*e*) Staying proceedings, p. 318.

debts; may submit differences on arbitration. Proviso for consent of creditors to compositions and arbitrations.

Sect. 52. Creditors to vote according to balance due to them on account fairly stated.

Sect. 53. Suits not to be abated by death or removal of assignees.

Sect. 54. Where the prisoner is beneficially entitled to stock, the Court may order a transfer.

Sect. 55. Assignees' power not to extend to the income of a benefice or curacy. Sequestration of profit may be obtained.

Sect. 56. Assignee's power not to extend to the pay or pension of naval, military, or civil officers. Portion of pay or pension may be obtained, on application.

Sect. 57. Goods in possession of prisoner, whereof he was reputed owner, to be deemed his property. No assignment of vessels, under 3 & 4 Will. 4, c. 55, to be affected.

Sect. 58. Distress not to be available for more than one year's rent.

Sect. 59. Voluntary preference fraudulent and void as against assignee.

Sect. 60. Provisions of 3 Geo. 4, c. 39, extended to the assignee of insolvents.

Sect. 61. Warrant of attorney and cognovit actionem not to be acted upon against goods of insolvent after his imprisonment.

Sect. 62. Assignees to file accounts. Accounts to be audited. Debts to be ascertained, and division made. How division to be made. Court may examine into disputed claims.

Sect. 63. If prisoner, or creditor, or Court dissatisfied with assignee, the Court may direct inquiry. Court may charge assignee with 20*l.* per cent. on money wilfully retained.

Sect. 64. Assignee to pay unclaimed dividends into Court.

Sect. 65. Court may remove assignees, and appoint new assignees. What shall be evidence of removal and appointment.

Sect. 66. Court may commit for refusing to file accounts, and other contempts. Proviso.

Sect. 67. Provisions concerning assignee, dividends, &c., to extend to cases now of record.

Sect. 68. Court may direct conveyance by provisional assignee, where no assignee is appointed.

Sect. 69. After order made, the prisoner to deliver in a schedule of debts, property, &c. Schedule to be filed, with books and papers.

Sect. 70. Court to appoint time and place for prisoner to be brought up. Manner of proceeding by commissioner on circuit.

Sect. 71. Notice to be given to creditors, and advertised.

Sect. 72. At the time of hearing, the schedule to be examined. Creditors may oppose prisoner's discharge. Hearing may be adjourned.

Sect. 73. Affidavits may be received in opposition to prisoner's discharge in certain cases.

Sect. 74. Schedule and prisoner's accounts may be referred to an officer of the Court, or an examiner, who may order prisoner to attend officer; and examiner may administer oaths. Court may order expenses of reference to be paid out of insolvent's estate.

Sect. 75. Court, &c., may adjudge a prisoner to be discharged from custody, and entitled to the benefit of this act.

Sect. 76. Court may adjudge discharge, and to be forthwith, or not later than six months from the filing of the petition.

Sect. 77. In certain cases discharge, &c., to be any period not later than three years from petitioning.

Sect. 78. In other cases discharge, &c., to be at any period not later than two years from petitioning.

XIII. RELATIVE TO THE INSOLVENT IN CASE OF BANKRUPTCY, BEFORE 1 & 2 Vict. c. 110, p. 318.

XIV. RELATIVE TO THE REMAND, BEFORE 1 & 2 Vict. c. 110, p. 318.

Sect. 79. Discharge may extend to process for contempt in non-payment of money, and to costs incurred by creditor, but subject to taxation.

Sect. 80. Discharge may extend to sums payable by way of annuity, &c.

Sect. 81. Court, &c., may order prisoner to be confined within the walls of the prison.

Sect. 82. Court, &c., may order costs in certain cases to be paid to opposing creditors out of insolvent's estate. Where opposition frivolous and vexatious, costs may be awarded to prisoner.

Sect. 83. Court or commissioner to make order pursuant to adjudication, and issue warrant to gaoler. Justices to certify their adjudication to the Court, who shall thereupon make order and issue warrant to gaoler. Specification of debts, &c., not necessary, in order to adjudication.

Sect. 84. Adjudication may be conditional in certain cases.

Sect. 85. Where adjudication is a discharge at a future period, the prisoner may be detained or arrested, &c., till that period arrives.

Sect. 86. Court may order detaining creditor to pay prisoner a sum not exceeding 4*s.* a week.

Sect. 87. Before adjudication prisoner shall execute warrant of attorney to confess judgment for amount of debts in schedule. Court may permit execution to be taken out thereupon when insolvent is of ability to pay, or is dead, leaving assets. No scire facias necessary. If application is ill-founded and vexatious, Court may dismiss the same with costs.

Sect. 88. Where insolvent shall, after discharge, become entitled to property which cannot be taken in execution, the assignee may apply to Court for relief. Court may order prisoner to be remanded to custody until he transfers such property.

Sect. 89. Manner of proceeding where, after the discharge of a prisoner, any person shall be possessed of stock in public funds, &c., belonging to him.

Sect. 90. Person discharged under the act not liable to imprisonment for debts, &c., to which adjudication extends. If arrested to be released by Judge of the Court from which process issued, who may order costs to be paid to him.

Sect. 91. After discharge, no execution to issue against insolvent for debts, &c., to which adjudication extends. Discharge under this act may be pleaded generally.

Sect. 92. When debts are satisfied, the Court may order warrant to be cancelled, and satisfaction to be entered on the judgment, and no assignment to be executed.

Sect. 93. Where error in schedule without fraud, this act to operate upon the actual amount of debt.

Sect. 94. Court, at request of creditors, may remove from the gaols of London, Middlesex, or Surrey, if their usual residence was elsewhere, to be heard in the county to which they are removed. After such removal creditors may oppose the discharge as in other cases. Expense of removal of prisoners.

Sect. 95. Benefit of act not to be allowed to prisoners removed by habeas corpus. Court may permit such prisoner to be removed back at the expense of any person willing to pay the same, whereupon the same proceeding may be had as in other cases.

Sect. 96. Adjudication and order to be final, unless obtained on false evidence, &c., in which case Court may order a re-hearing. Insolvent refusing to appear may be apprehended, &c. In adjudication of discharge on re-hearing, the time since former hearing not to be calculated.

Sect. 97. Where an order of discharge has been issued by mistake, the Court may revoke and amend the same.

Sect. 98. Prisoner may, after discharge, be examined as to estate and effects on application of assignee. Prisoner refusing to appear, or to answer questions, may be committed.

Sect. 99. Persons wilfully omitting any thing in the schedule guilty of a misdemeanor and liable to three years' imprisonment. Indictment need only set out substance of offence charged.

XV. RELATIVE TO THE INSOLVENT, BEFORE 1 & 2 VICT. C. 110.

(*a*) RIGHTS OF, p. 319.

(*b*) LIABILITIES OF, p. 319.

(*c*) ACTIONS BY AND AGAINST.

1. *When maintainable,* p. 320.
2. *Of the Arrest,* p. 320.
3. *Pleas,* p. 320.
4. *Replication,* p. 321.
5. *Evidence,* p. 322.
6. *Costs,* p. 322.
7. *Staying Proceedings,* p. 323.

(*d*) INDICTMENT AGAINST, p. 323.

Sect. 100. Person swearing falsely under this act liable to punishment inflicted for perjury.

Sect. 101. Provisions of act to extend to married women.

Sect. 102. Mode of proceeding with prisoners of unsound mind. Application may be made on behalf of such prisoners. Court may discharge such prisoners; may appoint assignees; may order judgment to be entered up.

Sect. 103. Discharge not to extend to Crown debtors, unless Treasury give consent.

Sect. 104. Prisoners under writ of capias or extent may apply to the Barons of the Exchequer to be discharged.

Sect. 105. Officer of court to produce proceedings and give copies. A copy of such proceedings under seal to be admitted as evidence.

Sect. 106. Manner of proceeding when the hearing takes place before commissioners on circuit, or justices in Wales.

Sect. 107. Powers of justices to compel the attendance of witnesses. Clerk of the peace may issue subpœnas.

Sect. 108. Examiners to be appointed for counties. Their fees.

Sect. 109. Fee to keeper for carrying each prisoner before the Court; for paying the expense of conveying prisoners to the assize towns; and also the other expenses in pursuance of this act.

Sect. 110. Sheriffs and other persons indemnified for obeying the order of the Court. If action for escape, &c. brought, the general issue may be pleaded, and this act given in evidence.

Sect. 111. What shall be sufficient to be set forth in the rules and proceedings of the Court.

Sect. 112. Before whom affidavits are to be sworn.

Sect. 113. Recovery of costs.

Sect. 114. Court to admit attornies to practise therein. Persons not duly appointed practising as attornies guilty of contempt.

Sect. 115. What shall be paid for insertion of advertisements.

Sect. 116. Proceedings not liable to stamp duty, nor sales to auction duty.

Sect. 117. Court may invest unclaimed money, and apply profit towards expenses of the Court.

Sect. 118. Court empowered, out of profit arising from unclaimed money, to direct the payment of expenses of prisoner's discharge.

Sect. 119. Prisoners for debt, or their creditors, not to petition any court for certain purposes, under 32 Geo. 2, c. 28.

Sect. 120. Records of the Court.

Sect. 121. Construction of act.

Sect. 122. Act may be altered.

Sect. 123. Commencement of act.

By 2 & 3 Vict. sect. 1, after reciting that, by 1 & 2 Vict. c. 110, it was, amongst other things, enacted, that the sum of 3*s.* and no more shall be paid to any printer

XVI. RELATIVE TO THE LIABILITY OF NEWLY ACQUIRED PROPERTY, BEFORE 1 & 2 Vict. c. 110, p. 323.

XVII. RELATIVE TO NEW SECURITIES GIVEN BY THE INSOLVENT, BEFORE 1 & 2 Vict. c. 110, p. 324.

I. RELATIVE TO THE MEANING OF THE WORD "INSOLVENT"*, AND CONSTRUCTION OF THE 7 Geo. 4.

Thorpe *v.* Eyre, H. T. 1834. K. B. 3 *N. & M.* 214.

In this case the Court held, that the 7 Geo. 4, c. 57, speaking only of acts done by the debtor, does not apply to the case of judgment by default, without clear proof of collusion with the creditor in permitting him to obtain the judgment for the purpose of giving him a preference over other creditors.

The word "debtor," in the 7 Geo. 4, does not apply to a case of judgment by default.

or proprietor of a newspaper for the insertion of any advertisement by that act directed to be inserted in any newspaper, and all printers and proprietors of newspapers were required to insert the same, on payment of the sum of 3*s.* for the insertion thereof, in such form as the Court for the Relief of Insolvent Debtors, or any commissioner thereof, should from time to time direct; and that it is just and expedient that the said act should be altered and amended as thereinafter mentioned; it is enacted, "That so much of the said act as is hereinafter recited shall be, and the same is hereby repealed; and that from and after the passing of this act all proprietors of newspapers shall and are hereby required to insert any advertisement or advertisements by the said act directed to be inserted in any newspaper, on payment of a reasonable compensation for the insertion thereof, in such form as the said Court or any commissioner thereof from time to time direct."

By sect. 2, after reciting that it is expedient that persons residing at a distance greater than ten miles from the court-house in Portugal-street, who may be willing to enter into recognizances of sureties for the due appearance of insolvent debtors before the Court, or before commissioners on their circuit, or before justices of the peace in Berwick-upon-Tweed, should be entitled to enter into such recognizances without the necessity of appearing for such purpose before the Court itself at its usual and ordinary place of sitting; it is enacted, "That the chief commissioner and other the commissioners of the Court for Relief of Insolvent Debtors for the time being shall and may by one or more commission or commissions, under seal of the said Court, from time to time as occasion shall require, empower such and so many fit and proper persons as they shall think necessary, in all and every the several towns and counties within England and Wales, and the town of Berwick-upon-Tweed, to take and receive all and every the recognizance or recognizances of sureties into which any person shall be willing to enter for the due appearance of insolvent debtors, according to such several and respective recognizances, and in such form as the court, in pursuance of the statute in that behalf, may and shall direct and require."

Sect. 3. Persons empowered to enter into recognizance, &c.

Sect. 4. Commissioners to make rules for regulating the amount and the taking of recognizances.

Sect. 5. Commissioners empowered to take such recognizances.

Sect. 6. Court to order discharge of insolvent where sureties justified by affidavits, &c.

Sect. 7. Commencement of act.

* The word "insolvency," in a contract, is not confined to the being discharged under the Insolvent Act, but an inability in the party to pay his just debts. (*Parker* v. *Gossage*, M. T. 1835, Ex., 2 C., M. & R. 617; S. C. 1 Tyrw. & G. 105).

SIMS *v.* SIMPSON, M. T. 1834. C. P. 1 *Bing. N. S.* 306; S. C. 1 *Scott*, 177.

The 7 Geo. 4 had not relation back to the first day of the insolvent's imprisonment.

IN an action of assumpsit by the assignees of an insolvent, for the value of goods sold by the insolvent to the plaintiff, a creditor, after his imprisonment, but before his petition and assignment—

The Court held, that the assignment of an insolvent debtor, under the 11th sect. of 7 Geo. 4, c. 57, does not relate back to the commencement of his imprisonment.

II. RELATIVE TO THE PERSONS WHO ARE OR ARE NOT ENTITLED TO THE BENEFIT OF THE ACT*.

III. RELATIVE TO THE PETITION, BEFORE 1 & 2 VICT. c. 110.

REED *v.* CROFTS, M. T. 1838. C. P. 7 *D. P. C.* 122; S. C. 5 *Bing. N. S.* 69.

The clause in 7 Geo. 4, c. 57, s. 42, as to notice of the petition, is only directory, not a condition precedent to the validity of the discharge.

To a plea that the defendant was duly discharged, under the Insolvent Debtors' Act, from the said several supposed promises and causes of action, a replication alleged that the plaintiff did not, at any time before the making of the order for the defendant's discharge, have, nor was he served with notice of the filing of the petition and schedule, nor of the time and place appointed for the hearing &c., though he, the plaintiff, was resident within the United Kingdom, and could and might have been served with such notice.

Per Cur.—As it appears to us, the 42nd section of the 7 Geo. 4, which directs "the Court to give notice of the filing of every petition, and of the time and place &c., by such means as it shall direct, to the creditor at whose suit the prisoner shall be detained in custody, and to the other creditors named in the schedule, and resident within the United Kingdom, and whose debts shall amount to the sum of 5*l.*, and to insert the same in the London Gazette" &c.,—is directory only, and is not a condition precedent, for the purpose of enabling to discharge the prisoner.

IV. RELATIVE TO THE ASSIGNMENT, BEFORE 1 & 2 VICT. c. 110.

(*a*) OF THE PROVISIONAL ASSIGNMENT.

WILLES *v.* ELLIOTT, M. T. 1827. C. P. 4 *Bing.* 392; S. C. 1 *M. & P.* 19.

Under the 7 Geo. 4, the as-

AN insolvent debtor filed his petition, and executed an assignment of his property to the provisional assignee of the Insolvent

* The general rule of law is, that all persons in custody within the walls of a prison, on account of debt or non-payment of money, are entitled to the benefit of the Insolvent Act.

Debtors' Court, but died before the day on which his petition was to have been heard, and before his estate had been assigned by the provisional assignee to the after-appointed assignees.

The Court held, that, notwithstanding the death, the property vested in the last-mentioned assignees.

signment by the provisional assignee might be made to the assignees after the insolvent's death.

(*b*) WHAT PASSES.

1. *In general.*

TIBBITS *v.* GEORGE, T. T. 1836. K. B. 5 *Ad. & E.* 107.

THE insolvent, having a debt due from M., secured on mortgage, but subject to a prior charge, on the bankruptcy of M. agreed verbally with the defendant to assign the debt for monies advanced, the solicitor to M.'s commission advising that no written instrument was necessary, as the dividends on M.'s estate would pass through his hands, but he did not *communicate* the assignment to M.'s assignee, the mortgage being unavailable; the debt was proved, and dividends received and paid over by the insolvent to the defendant. In an action by the assignee of the insolvent for money had and received—

That which amounts to a valid assignment in equity does not pass.

The Court held, 1st, that the debt was not in the order and disposition of the insolvent, within 7 Geo. 4, c. 57, s. 30; 2ndly, that the assignment would be a valid assignment in equity; and that the debt being certain, and the assignment only of so much of the dividends as would be sufficient to satisfy the debt, the whole did not pass to the assignee, subject to the defendant's claim or lien.

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2. *Chose in Action.*

BUCK *v.* LEE, T. T. 1834. K. B. 3 *N. & M.* 580.

THE defendant pleaded to an action for goods sold, and monies had and received, that the plaintiff had been discharged under the Insolvent Act, and had assigned all his debts, which were become vested in the provisional assignee; to which the plaintiff replied, that before such discharge he had assigned the debt in question, amongst others, to a creditor, with an irrevocable power of attorney to sue in his name. On demurrer—

A debt duly assigned passes, unless notice has been given.

The Court held, that, until notice of such assignment to the debtor, the debt must still be taken to be in his order and disposition, and passed therefore to the provisional assignee.

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3. *Benefice.*

BISHOP *v.* HATCH, E. T. 1834. K. B. 3 *N. & M.* 498; S. C. 1 *Ad. & E.* 171.—S. C. CHUTER *v.* HATCH, E. T. 1834. K. B. 3 *N. & M.* 498.

UPON a construction of the 7 Geo. 4, c. 57, ss. 11, 28—

The Court held, 1st, that the assignees of an insolvent beneficed parson take no interest in the income of his benefice, but only upon

Under the 7 Geo. 4, the assignees take no

interest in a clergyman's benefice; a sequestration must be obtained.

their application for a sequestration after the adjudication, and that subject to the priority of other writs of execution which may have issued; and that, until then, there is nothing to prevent other creditors issuing them; and, 2ndly, that where a creditor issued a sequestration on a judgment founded on a warrant of attorney, and the sequestration issued after the insolvent was in prison, it did not affect such priority, the 34th section applying only to cases where seizure and sale are a necessary part of the execution, and therefore not to cases of sequestration.

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4. *Copyholds.*

DOE *d.* BRENAN *v.* GLENFIELD, E. T. 1835. C. P. 1 *Scott*, 699.

The assignment vests the insolvent's copyhold estate in the assignee.

IN ejectment to recover copyhold property by the assignee of an insolvent—

The Court held, it was not necessary that the conveyance and assignment from the provisional to the general assignee (lessor of plaintiff) should be entered on the court rolls. It is sufficient that such conveyance should be entered in the minute book of the steward. The entry of such conveyance on the roll is only requisite under the 20th sect. of 7 Geo. 4, c. 57 (Insolvent Debtors' Act), in case of a sale of the property in question.

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5. *Legacies.*

BEST *v.* ARGLES, H. T. 1834. Ex. 2 *C. & M.* 394.

Under 7 Geo. 4, a legacy due to the wife passes to the husband's assignee.

THE husband and wife gave a note to a party, to whom the husband was indebted, to receive a legacy, payable to the wife, which the executor declined paying; and the husband was subsequently discharged under the Insolvent Act.

The Court held, that, being a mere authority, and not so clear an assignment of the legacy as a court of equity would decree to pass it, the assignee of the insolvent was, in a court of law, entitled.

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6. *Pensions.*

BATTINE, *Ex parte*, E. T. 1833. K. B. 1 *N. & M.* 579; S. C. 4 *B. & Ad.* 690.

Under 7 Geo. 4, a pension chargeable on the navy estimates to an advocate of the admiralty passes.

THE insolvent, a late advocate-general to the Admiralty, petitioned the Insolvent Court. It appeared that he had been superseded from ill-health, and that the Prince Regent, on behalf of his Majesty, and with the advice of the Privy Council, accordingly ordered that a pension of 200*l.* a year should be granted to him, the same pension to commence from the day on which he ceased to hold his office, and to be placed to the ordinary estimates of his Majesty's navy, and the lords commissioners of the Admiralty were to give further directions therein.

The Court held the pension assignable by the Insolvent Court under 7 Geo. 4, c. 57.

7. *Wife's Property*.*

(*c*) Of the sale under.

Doe *d.* Phillips *v.* Evans, H. T. 1833. Ex. 1 *C. & M.* 450.

In an action of ejectment—

The Court said that the 1 Geo. 4, c. 119, s. 7, as to the proceedings previous to a sale, is, it seems, directory only, and therefore a purchaser may maintain ejectment without proving that the requisites thereof have been complied with.

The 1 Geo. 4, c. 119, s. 7, is directory only as to the sale of the insolvent's estate.

(*d*) Effect of†.

Hepper *v.* Marshal, M. T. 1824. C. P. 2 *Bing.* 372.

In construing the 1 Geo. 4, c. 119, as to what property passed under the assignment—

The Court held, that an assignment of the property of an insolvent debtor under the stat. 1 Geo. 4, c. 119, only transfers the property the insolvent was possessed of at the time of presenting his petition for his discharge, and does not pass any after acquired property to his assignee.

Under 1 Geo. 4, c. 119, the assignment only vested the insolvent's property up to the time of the petition.

V. RELATIVE TO THE SCHEDULE, BEFORE 1 & 2 Vict. c. 110.

Tyers *v.* Stunt, E. T. 1839. C. P. 7 *Scott*, 349.

The insolvent, the defendant, was indebted to the plaintiff in two distinct claims, or sums of money; he inserted only one in his schedule. In an action by the plaintiff against the defendant to recover the debt not inserted in the schedule.

The Court held, that the insertion of the one claim did not release the other.

If only one of two debts be inserted in the schedule, it is no discharge of the other‡.

* The goods of a woman married to and living with an insolvent as his wife, he having a former wife living, do not pass to his assignees (although such goods were in his possession), if she was ignorant of the former marriage; but if she has allowed him the control and management of her property after discovery of the former marriage, such property passes to the assignees. (*Miller* v. *Demetz*, T. T. 1835, N. P., 1 M. & Rob. 479).

† A party by obtaining, by way of fraudulent preference, from an insolvent, pawnbrokers' duplicates, and redeeming the articles, cannot retain them for the money paid. (*Ayling* v. *Williams*, M. T. 1832, N. P., 5 C. & P. 399).

‡ Where defendant was sued as joint maker of a note for 14*l.*, after being discharged under the Insolvent Act, having given no notice to the plaintiff, but in his schedule stated his having accepted several bills for M., the other joint maker, on which the plaintiff had a claim against him to the amount of 18*l.*:—Held, that if the defendant knew that the note was payable to the plaintiff, notice should have been given to him; but if the jury thought he did not know it, the body of the note being in the handwriting of M., it was not necessary. (*Sharpe* v. *Gye*, E. T. 1830, N. P., 4 C. & P. 311). If an insolvent knows the party to have been the holder of a bill, he is bound under 7 Geo. 4, c. 57, to give him notice, though he is ignorant at the time of filing his schedule whether he was the holder or not. (*Pugh* v. *Hookham*, T. T. 1832, N. P., 5 C. & P. 376).

TABRAM *v.* FREEMAN, H. T. 1834. Ex. 2 *C. & M.* 451; S. C. 2 *D. P. C.* 375.

But a debt omitted by agreement is discharged.

IT was agreed between an insolvent debtor and an attorney employed to prepare his schedule and obtain his discharge, that a debt due to the attorney and secured by cognovit should be omitted in the schedule, and that the cognovit should be suspended until after the insolvent's discharge, and then revived.

The Court held the arrangement a fraud on the Insolvent Act, and on the creditors of the insolvent; therefore judgment and execution upon such a cognovit, after the discharge of the insolvent, set aside.

HOWARD *v.* BARTOLOZZI, M. T. 1832. K. B. 1 *N. & M.* 69.

Where an attorney of an insolvent omits his own debt in the schedule and then sues the defendant, it is a question for the jury whether the debt was fraudulently omitted.

THE plaintiff acted as the attorney of the defendant up to the time of obtaining her discharge under the Insolvent Act, although not being qualified to act he did not act in that Court. It appeared that he had omitted his own debt in the schedule, and the defendant had subsequently promised payment.

The jury at first found a verdict for the defendant, and upon being asked what were their grounds for so doing, stated that they considered that the plaintiff had fraudulently omitted to put his debt on the schedule, with an intention afterwards to bring an action against her for it. Whereupon the learned judge directed that a verdict should be found for the plaintiff, and gave liberty to the defendant to move to enter a verdict for the defendant, or a nonsuit, as the Court should think fit. On motion for a new trial—

Per Cur.—If the fraud were distinctly made out, the verdict ought to be set aside. From the finding, it appears that there was a fraud; that the plaintiff wilfully concealed his debt that it might not be put into the schedule, but we do not think the finding is warranted by the facts proved; for there is evidence to shew that the defendant did not expect that she was relieved from the debt to the plaintiff. There is proof, on the other hand, that there was a wilful concealment by both parties; but, as the jury have found a special verdict, and as we think that the facts are not properly ascertained, a new trial must be had, for the jury to say if the debt was fraudulently omitted by the plaintiff in breach of his duty, without the consent of the defendant.

FORMAN *v.* DREW, E. T. 1825. K. B. 4 *B. & C.* 15; S. P. WOOD *v.* JOWETT, E. T. 1825. K. B. *Id.* 20.

A misdescription of the debt not made to mislead, or tending to do so, will not prevent the defendant's discharge*.

IN the defendant's schedule was the following entry:—"1820, 1821, Mr. Thomas Webb, Newport, Monmouthshire, 82*l.* for coals. He holds a bill of exchange, drawn by Mr. Norris upon and indorsed by me. Date and other particulars I cannot state." This debt was similarly stated in the order of discharge. This order of discharge was impugned on the ground that the debt described in the schedule was 82*l*; but that of the plaintiff was 82*l.* 2*s.* 6*d.*

Per Cur.—The true question is, whether the schedule contains such a reasonable description of the debt as will enable the creditor

* Whether a misdescription in a schedule was purposely made or not is a question for the jury. (*Levy* v. *Dolbell*, T. T. 1828, N. P., 1 M. & M. 202).

on examining the Gazette to oppose with effect. Here the variance is so small between the debt due to the plaintiffs and that named in the schedule, that it could not have been meant to mislead, nor could it in point of fact mislead the creditor.

VI. RELATIVE TO THE DETAINER, UNDER 1 & 2 VICT. c. 110.

TURNOR *v.* DARNELL, E. T. 1839. Ex. 7 *D. P. C.* 346; S. C. 5 *M. & W.* 28.

Under 85th sect. 1 & 2 Vict. c. 110, a ca. sa. may issue in the first instance to detain an insolvent.

THE defendant had recently applied for the benefit of the Insolvent Debtors' Act, when he was opposed by the plaintiff, and adjudged to be entitled to his discharge at the end of five months. The plaintiff then issued a capias against him in the form prescribed by the Uniformity of Process Act. It was objected that the proceeding was a contravention of the first and third sections of the 1 & 2 Vict, c. 110, which abolished arrest on mesne process: and also that a writ of summons should have been sued out according to the provisions of the second section, which requires that all personal actions shall be commenced by writ of summons.

Per Cur.—The only question arises under the second section of the 1 & 2 Vict. c. 110, which requires a writ of summons in every case. The Court are of opinion that the 85th section preserves the old process with respect to insolvent debtors.

VII. RELATIVE TO THE RIGHTS OF THE ASSIGNEES, BEFORE 1 & 2 VICT. c. 110.

GARRY *v.* SHARRATT, E. T. 1830. K. B. 10 *B. & C.* 716.

The assignees have only such interest in law or equity as the insolvent had*.

THIS was an action of assumpsit by the assignee of Flowers, an insolvent debtor, for money stated to have been received by the defendant to the use of Flowers. The defendant was mortgagee.

Per Cur.—Nothing passes to the assignee but that to which the insolvent is entitled in equity as well as at law. At law, Flowers was entitled to the land; in equity, the defendant, as mortgagee, was entitled to the land and the rents accruing from it. The assignment to the plaintiff, therefore, could not give him any right to those rents, nor would he be entitled to receive them.

TWISS *v.* WHITE, E. T. 1826. C. P. 3 *Bing.* 486; S. C. 11 *Moore*, 413.

The assignees can only take property of the

A. B., BEING possessed of a copyhold estate, agreed to surrender it to C. D., but it had been by mistake previously conveyed to the trustees of E. F. A. B. afterwards became insolvent, and was dis-

* Although the statute gives the assignee the insolvent's property by relation:—Held, that it did not give validity to an action brought and declarations filed before the assignment, although executed before the trial. (*Lawrence* v. *Miller*, 1830, N. P., 2 M. & M. 97). The assignment does not vest in the assignee a term of years absolutely, until they have elected to take it. (*Lindsay* v. *Limbert*, E. T. 1829, C. P., 12 Moore, 209).

insolvent subject to all charges created by him*.

charged under the act; and, after his discharge, the trustees of E. F. reconveyed the premises to A. B., who, on the same day, surrendered them to C. D., who paid the purchase-money to G. H. on account of A. B.:—Held, that the assignees of A. B., under the Insolvent Debtors' Act, might recover the money from G. H., in an action for money had and received; but that the latter was entitled to deduct the amount of his bill of charges incurred in making the surrender, as the property was recovered to the use of the assignee, subject to such charges as the insolvent was entitled to attach on the property, and the assignee must take it subject to those charges.

VIII. RELATIVE TO PAYMENTS BY AND TO, BEFORE 1 & 2 Vict. c. 110.

Wainwright *v.* Miles, E. T. 1833. C. P. 3 *M. & Scott*, 211.

Whether a payment under the 7 Geo. 4, c. 57, be fraudulent or not, was a question for the jury†.

In this case—

The Court held, that a fraudulent payment or transfer is still within the 7 Geo. 4, c. 57, although the three months may have elapsed; and whether it was made or assented to by the insolvent with the view of petitioning for his discharge under the act, ought to be left to the jury.

Mogg *v.* Baker, M. T. 1838. Ex. 4 *M. & W.* 348.

A demand bonâ fide made by a creditor for a transfer,

A party, in insolvent circumstances, made a transfer of goods upon the bonâ fide request of a creditor.

The Court held it was not a voluntary transfer within the Insolvent Act. It is not necessary, in order to support it, that it should have been made in consequence of pressure on the part of the creditor, or that the insolvent expected to be in a worse condition if he did not make it.

Reynard *v.* Robinson, E. T. 1833. C. P. 9 *Bing.* 717; S. C. 3 *M. & Scott*, 127.

or a payment made under the threat of the creditor's putting his claim into the attorney's hands, is protected.

A creditor wrote to his debtor, reminding him of his debt, and required payment within a few weeks, otherwise he would employ an attorney. The debt was discharged without any subsequent act upon the part of the creditor in three weeks from the receipt of the letter. The debtor was insolvent, and took the benefit of the act 7 Geo. 4, c. 57. His imprisonment commenced within three months of the time of the payment. The assignee brought an action against the creditor to recover the sum thus paid; and upon special case,

* Where a devisee having taken the benefit of the Insolvent Act, and made the assignee a party to a suit for redemption and general account, who, by his answer, disclaimed all knowledge of the assignment, and refused the trust for the creditors:—Held, that he could not be compelled to act, and the suit could not proceed until another assignee had been appointed, and that a decree made in such an imperfect state of the cause was erroneous. (*Rylands* v. *Latouche*, 2 Bligh, P. C. 566).

† Under 7 Geo. 4, c. 57, s. 32, the payment must be made with knowledge of the insolvency, and voluntarily. (*Troup* v. *Brooks*, M. T. 1830, N. P., 4 C. & P. 320).

stating that the debtor (insolvent at the time) made the payment in consequence of the letter—

The Court held, that this was not a voluntary payment, or fraudulent and void within the 32nd section of the statute.

WAINWRIGHT *v.* CLEMENT, M. T. 1838. Ex. 4 *M. & W.* 385.

A. BEING in difficulties, and having had actions commenced against him by some of his creditors, applied professionally to the defendants, who were attornies, on the 14th of March, 1837. The defendants attended several meetings with A. and his creditors, the object of which was to make such arrangements as would prevent the necessity of his taking the benefit of the Insolvent Act. The creditors who had commenced actions were still pressing them on to judgment when it was ultimately determined, that an immediate sale of A.'s effects should take place, with a view to a rateable distribution of his property. A sale accordingly took place on the 12th of April; and, previously to the sale, A. directed the auctioneer to obey the orders of the defendants as to the proceeds of the sale, who directed him to pay over to them, which he accordingly did. A. petitioned for his discharge, which he obtained. The plaintiffs were appointed his assignees. The defendants retained 85*l.* of the money they received to satisfy their own bill of costs against the insolvent. In an action to recover this sum as money had and received to the use of the assignees—

So, a retainer by the insolvent's attorney of money, the result of sale of his effects, for his bill of costs, is not a voluntary payment.

The Court held, that this was not a voluntary transfer or delivery by the insolvent to the defendants within the meaning of the 32nd sect. of 7 Geo. 4, c. 57.

HERBERT *v.* WILCOX, M. T. 1829. C. P. 6 *Bing.* 203; S. C. 3 *M. & P.* 515.

THE insolvent had paid a bonâ fide debt to the defendant within three months before his imprisonment. In an action by the plaintiff as assignee, on the part of the plaintiff, it was contended that, this payment to the defendant having been made by the insolvent, Fisher, three months before the commencement of his imprisonment was fraudulent and void under the 7 Geo. 4, c. 57, s. 32. For the defendants, it was submitted that the statute did not mean to invalidate bonâ fide payments made to creditors in the ordinary course of business, and that this was not such a voluntary delivery of money as was contemplated thereby.

In a prior case, it was held, under the 7 Geo. 4, a payment by an insolvent within three months before his imprisonment was void.

The Court held, that a voluntary payment to a creditor by an insolvent within three months before his imprisonment, although in discharge of a bonâ fide debt, is a fraudulent delivery of money within the 32nd sect. of 7 Geo. 4, c. 57, and consequently void.

WHITE *v.* BARTLETT, M. T. 1832. C. P. 9 *Bing.* 378; S. C. 2 *M. & Scott*, 515.

THIS was an action brought against the defendant, an auctioneer, under the following circumstances:—The defendant, an auctioneer, being employed by a person, who was in embarrassed circumstances, to sell his property, sold the same, and paid the proceeds to the

An auctioneer, employed by an insolvent while in prison, is justified in

paying over the money.

order of his employer, who shortly afterwards was declared insolvent, and the plaintiff chosen assignee of his estate.

The Court held, that the defendant, being an agent merely for such employer, was justified in so paying over such proceeds to his order, although he was aware of his embarrassment.

IX. RELATIVE TO EXECUTIONS, BEFORE 1 & 2 Vict. c. 110*.

Kelcey *v.* Minter, E. T. 1835. C. P. 1 *Bing. N. S.* 724; S. C. 1 *Scott*, 616.

Under 7 Geo. 4, an execution and sale after the imprisonment is not protected;

In trover by the plaintiff, as assignee of an insolvent—

The Court held, that trover lies against the execution creditor, for the sale of goods taken in execution upon a judgment entered on a warrant of attorney, after the imprisonment of the insolvent has commenced.

Guy *v.* Hitchcock, M. T. 1835. K. B. 5 *N.* & *M.* 660.

and the proceeds paid over may be recovered back by the assignees.

20th October. The defendants, who were judgment creditors of A., caused his goods to be seized in execution. Same day, A. went to prison. 23rd October, the goods were sold under the execution. 31st October, 69*l.*, being the produce of the sale, was paid into the defendant's hands. A. petitioned to be discharged under the Insolvent Debtors' Act, and executed the assignment to the provisional assignee. 16th November the plaintiff became assignee of the estate and effects of A. In an action for money had and received by the plaintiff as assignee of A.—

The Court held, that the plaintiff was entitled to the verdict. As the assignment has relation to the imprisonment, then the money was the money of the assignees.

X. RELATIVE TO FRAUDULENT CONVEYANCES, BEFORE 1 & 2 Vict. c. 110†.

Sharpe *v.* Thomas, H. T. 1830. C. P. 6 *Bing.* 416.

A warrant to enter up judgment within four days, is a void transfer,

An insolvent, with a view to taking the benefit of the act, and by way of a fraudulent preference of the particular creditor, gave a warrant of attorney for judgment at four days, under which all his goods were taken in execution and sold.

* Sect. 57 of the 7 Geo. 4, c. 57 (the Insolvent Act), which authorizes execution in certain cases against an insolvent who has obtained his discharge, does not apply to a ca. sa. (*Rivett* v. *Lark*, M. T. 1834, B. C., 3 D. P. C. 62).

† Where the transfer was made by the insolvent under an apprehension of arrest:—Held, not fraudulent as a voluntary transfer, within 7 Geo. 4, c. 57, s. 32. (*Corbould* v. *Broadhurst*, T. T. 1832, N. P., 1 Moo. & Rob. 189). Where the insolvent, whilst in prison, being under a covenant by marriage settlement to pay money, when required, to the trustees, gave to his son and the trustees an authority to sell and apply the proceeds to the use of the settlement, which proceeds remained in their hands:—Held, that his assignee, under the compulsory clauses of the Lords' Act, was entitled to recover it as money received to the plaintiff's use, if the jury believed that it was in substance held at the disposal of the insolvent, otherwise if they believed it to have been a bonâ fide payment of an equitable debt; held also, that the plea of non assumpsit put in issue all the facts necessary to shew that the receipt was to the use of the plaintiff. (*Moore* v. *Eddowes*, 1835, N. P., 7 C. & P. 203).

The Court held, that the warrant of attorney so given and acted upon operated as a "transfer" of or charge upon his estate, within the 32nd sect. of the 7 Geo. 4, c. 57; and that the sale of the goods under the circumstances was an "assignment" of his effects, within the same section, and void.

under the 7 Geo. 4, c. 57, as against creditors;

BECKE *v.* SMITH, M. T. 1836. Ex. 2 *M. & W.* 191.

WRIGHT brought an action against the insolvent, which came on for trial at the Spring Assizes, in 1834, and was undefended. The commission day was March 1, and on that day the insolvent gave a bill of sale of all his effects to the defendant, in satisfaction of a bonâ fide debt; under that bill of sale the defendant sold the effects. The insolvent went out of the way, but returned in March, 1835, when he went to prison. He petitioned for his discharge under the Insolvent Debtors' Act, and was opposed. The commissioner, who heard the case, ordered him to be detained for eight months, and the plaintiff was appointed his assignee. The action was brought to recover the proceeds of the sale by the defendant, the plaintiff contending that that bill of sale was void by the 7 Geo. 4, c. 57, s. 32, being a voluntary conveyance made with the view of petitioning the Court for his discharge.

The Court held, that a voluntary conveyance by an insolvent debtor, executed by him at any time with a view of petitioning the Insolvent Debtors' Court for his discharge, was void by the 7 Geo. 4, c. 57, s. 32.

and even though longer than three months previous.

DAVIES *v.* ACOCKS, T. T. 1835. Ex. 2 *C., M. & R.* 461.

THE insolvent, when in prison, was informed by the agent of his creditors that, unless he executed a trust deed for the benefit of all of them, they would make a bankrupt of him, and would not consent to his discharge from prison, and thereupon, after three days' deliberation, executed it reluctantly.

The Court held, that a deed executed by an insolvent debtor in prison, for the benefit of all his creditors, is not a voluntary deed, which is avoided by the 7 Geo. 4, c. 57, s. 32, (dubitante *Alderson*, B.)

But a conveyance executed by an insolvent in favour of his creditors under a threat of bankruptcy, is not void, as it is not voluntary;

DOE *d.* BOYDELL *v.* GILLETT, M. T. 1835. Ex. 2 *C., M. & R.* 579; S. C. 1 *Tyrw. & Gr.* 115.

A CONVEYANCE of premises was executed by an insolvent trader. On the question whether it was a voluntary conveyance within the 7 Geo. 4, c. 57.

The Court held that it was necessary, in order to invalidate it under the 7 Geo. 4, c. 57, to shew that it originated in the voluntary act of the trader, and not on a bonâ fide application of the creditor.

though it will be invalid if it originate as the voluntary act of the trader*.

* Where the consideration for the conveyance was partly an advance and partly a pre-existing debt:—Held, that if such consideration bonâ fide acted upon the mind of the party, it was not fraudulent and void, as a voluntary conveyance within 7 Geo. 4, c. 57, s. 32. (*Margareson* v. *Jones*, 1 Younge, 525).

XI. RELATIVE TO THE DISCHARGE.

(*a*) Before 1 & 2 Vict. c. 110.

1. *With reference to the Debts*.*

Taylor *v.* Buchanan, T. T. 1825. K. B. 4 *B. & C.* 419; S. C. 6 *D. & R.* 491.

The schedule is the test as to the debts from which the insolvent is discharged.

To an action for goods sold, plea, the Insolvent Act—

The Court held, that the discharge of an insolvent only relieves him from the specific debts described in his schedule; and the surplus of a debt which he has stated in his schedule at less than its real amount, may be set off against any action by such insolvent.

Wilmer *v.* White, M. T. 1829. C. P. 6 *Bing.* 291; S. C. 3 *M. & P.* 671.

The 7 Geo. 4, only applied to costs due from the insolvent at the time of the imprisonment.

In replevin, interlocutory judgment was signed against the defendant for want of an avowry. The defendant was afterwards arrested by another creditor, and obtained his discharge under the Insolvent Debtors' Act. After the dicharge, the plaintiff executed a writ of inquiry, and issued a fi. fa. for the amount of damages and costs.

The Court refused to set aside the fi. fa. for irregularity, holding that the judgment was not such an ascertained debt, at the time of the imprisonment, as to be affected by the insolvent's discharge.

Boydell *v.* Champneys, H. T. 1837. Ex. 2 *M. & W.* 433.

Inserting the name of the holder of a bill is sufficient.

To an action by the drawer against the acceptor of a bill of exchange, the defendant pleaded his discharge under the Insolvent Act. It appearing that the defendant had been sued by the holder of the bills at the time of his discharge, and whose name he had inserted as the creditor for the amount of the bill—

The Court held that he was thereby discharged from the debt, the only object of the sect. 46 being to identify the debt; and that such insertion was sufficient notice to all persons interested in the security.

Reeves *v.* Lambert, E. T. 1825. K. B. 4 *B. & C.* 214.

And the discharge operates as against a holder of a bill of exchange†, if the original

In assumpsit, it appeared that defendant, being indebted to A. for goods sold, accepted a bill drawn by A. for the amount, which became due in October 1823. Before that time defendant became insolvent, and presented his petition to be discharged; and in his schedule, delivered into the Insolvent Debtors' Court, he stated that

* The debts from which the insolvent is discharged must be either certain or capable of being rendered so. When the debt depended on a contingency in an order of a Judge, &c. made at Nisi Prius:—Held, that it was not discharged, and an attachment granted. (*Lawrence* v. *Walker*, E. T. 1835, B. C., 3 D. P. C. 614). The Insolvent Act applies only to discharge the insolvent from the particular debts specified in the schedule, and not to all the debts due to the creditors named. (*Bishop* v. *Polhill*, 1837, N. P., 2 M. & Rob. 363).

† Under 7 Geo. 4, c. 57, the defendant is discharged as to claims on bills, if it appears that at the time of making out his schedule he did not know the holder; aliter, if he had been once informed, although he might have forgotten it. (*Lewis* v. *Mason*, M. T., 1830, N. P., 4 C. & P. 322).

he was indebted to A. for goods, and that A. held his acceptance for the amount, which became due in October 1823. A. had indorsed the bill to B., but the insolvent was ignorant of that fact. B. having brought an action against the insolvent upon the bill, the latter pleaded his discharge under the Insolvent Debtors' Act.

The Court held, that as the schedule contained a true description of the person to whom the insolvent was indebted, within the meaning of the 1 Geo. 4, c. 119, s. 6, the debt and bill were discharged.

debt be stated in schedule, and that a bill had been given for the amount.

SAMMON *v.* MILLER, E. T. 1832. K. B. 3 *B. & Ad.* 596.

DEBT on bond, to which the defendant pleaded a discharge under the Insolvent Debtors' Act, 53 Geo. 3, c. 102; and the plaintiff replied that he was not duly discharged. It appeared that the bond was entered into by the defendant, in order to secure the reinvestment of and the payment of dividends which would have become due on certain bank annuities. The defendant, after having made default, and given a warrant of attorney to enter up judgment, if the principal was not paid before the 9th October, 1820, before that time became insolvent and took the benefit of the act.

The Court held, that the bond having been forfeited became a debt at law to the amount of the penalty; and, although there might be some difficulty in ascertaining the real amount to which the plaintiff was entitled, the defendant was discharged from that bond.

See Buck, B. C. 188; 7 *Ves.* 301.

Under 53 Geo. 3, c. 102, an insolvent is discharged from a bond to replace stock, if there be a forfeiture of the penalty before he was entitled to his discharge.

SAMMON *v.* MILLER, T. T. 1829. K. B. 9 *B. & C.* 770; S. C. 4 *M. & Ry.* 551.

THE defendant had been discharged, under the 53 Geo. 3, c. 182, the plaintiff being a scheduled creditor for a loan of stock, secured by a bond and warrant of attorney to replace it, and pay the dividends in the meantime, but the period for replacing it had not then arrived, and no dividends were in arrear, but before the defendant had applied for his discharge judgment had been entered up.

The Court held, that the defendant was entitled to his discharge on filing common bail. And semble, by analogy to the bankrupt laws, the whole debt was proveable against the insolvent's estate, and the debt thereby discharged.

So, where money was to be replaced, but the time had not arrived, the debt, if inserted in the schedule, is it seems discharged.

EVANS *v.* WILLIAMS, M. T. 1824. Ex. 1 *M'Clell.* 577.

AN insolvent. The defendant had been attached for want of appearance, and being in custody, and persisting in his contempt, had been brought into Court, where an appearance was entered for him, pursuant to the statute 5 Geo. 2, c. 25, s. 2. Subsequently, having been brought up with a view of taking the bill pro confesso, he tendered an answer, which was accepted on the part of the plaintiff.

The Court held, that the insolvent was entitled to be discharged out of custody, without payment of the costs of a contempt of this Court, which had been previously cleared, such costs having been included in his schedule of debts.

An insolvent is entitled to his discharge after being in contempt, although he has not paid the costs incident to such contempt*.

* Under 48 Geo. 3, c. 123, a person in custody for contempt in not paying costs was not entitled to his discharge. (*Rex* v. *Clifford*, M. T. 1827, K. B., 8 D. & R. 58).

GOLDSMID *v.* LEWIS, T. T. 1836. C. P. 3 *Bing. N. S.* 46; S. C. 3 *Scott*, 369.

A verdict in tort, before petition heard, is discharged under 7 Geo. 4, as well as the costs.

AN action in tort had been brought against the defendant, and was tried at the sittings after Hilary Term, and a verdict passed against him with 31*l.* damages. Upon the 9th of March, before final judgment was or could be signed, he filed his petition in the Insolvent Debtors' Court, and gave the plaintiffs the usual notice of his intention, required by the statute, and inserted them in his schedule as creditors for 31*l.*, the amount of the damages, and 200*l.* for the supposed amount of the costs incurred in the action. The plaintiffs signed final judgment upon the 20th of April, the day before the insolvent was heard on his petition, and discharged. These costs were taxed and allowed upon the 15th of May, and afterwards the plaintiffs took the defendant in execution for damages and costs.

The Court held, that the defendant was entitled to his discharge, as the circumstances under which he was taken in execution were provided for by the 50th section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57.

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2. *With reference to particular Persons.*

1.—*As to Husband and Wife.*

LOCKWOOD *v.* SALTER, T. T. 1833. K. B. 2 *N. & M.* 255; S. C. 5 *B. & Ad.* 303.

The husband's discharge is a discharge of the husband and wife for a debt dum sola.

THIS was an action against husband and wife, upon a covenant for the payment of money to the plaintiffs, entered into by the wife before marriage. The defendants pleaded the discharge of the husband, under the 7 Geo. 4, c. 57. To this the plaintiffs demurred; and the question raised by the demurrer was, whether this discharge of the husband, under the Insolvent Act, was an extinguishment of the debt due from the wife.

Denman, C. J.—The case of *Miles* v. *Williams*, 8 B. & C. 1, is in point, and has been followed by a decision of the late Lord *Redesdale* to the same effect. It appears to me, therefore, that the debt is barred for ever.

2.—*As to Principal and Surety.*

POWELL *v.* EASON, M. T. 1831. C. P. 8 *Bing.* 23; S. C. 1 *M. & Scott*, 68: S. P. HAKER *v.* BROWNE, E. T. 1838. C. P. 4 *Bing. N. S.* 100.

A surety who pays money after the insolvent's discharge may sue the insolvent;

ASSUMPSIT for money paid. Plea of discharge under the Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 61. Verdict for the plaintiff.

The Court held, that the Insolvent Debtors' Act does not, like the Bankrupt Act, discharge the insolvent from the action of his surety, for money paid after the insolvent's discharge, upon a security entered into before taking the benefit of the act.

See Page v. *Russell*, 2 *M. & Selw.* 551.

ABBOTT *v.* BRUERE, M. T. 1839. C. P. 5 *Bing. N. S.* 598; S. C. 7 *Scott*, 753.

as, for arrears of an annuity.

TO an action of covenant on an annuity bond, the defendant pleaded his discharge under the Insolvent Act.

The Court held, that the discharge of a principal, under the Insolvent Debtors' Act, does not free him from his liability to a surety for his payment of an annuity to a third party, although the default took place before the insolvency of the principal.

GUY *v.* NEWSON, M. T. 1833. Ex. 2 *C. & M.* 140; S. C. 4 *Tyrw.* 31.

But, a surety is discharged from instalments becoming due under a covenant after his discharge,

UPON a dissolution of partnership, it was agreed that one should have the benefit of all debts, and the other be paid a sum at all events, for which a security was given by the other partner, and two sureties, they covenanting jointly and severally for the payment by quarterly instalments, with interest.

The Court held, that one of the sureties having taken the benefit of the act was discharged from liability for instalments becoming due after his discharge.

COLLINS *v.* LIGHTFOOT, T. T. 1826. K. B. 5 *B. & C.* 581; S. C. 8 *D. & R.* 339.

if he inserts the security in his schedule.

THE defendant was a surety in a grant of annuity, by bond, by one Edgeworth Moore, to the plaintiff; that, in 1820, he was discharged under the Insolvent Act, as to all debts contained in his schedule then filed; and that in his schedule he inserted not only the principal consideration money, but also the arrears.

The Court held, there was no distinction between principal and surety, and that the surety was discharged from arrears owing after his discharge in consequence of failure of payment by his principal.

3.—*Of Contracts not to oppose Discharge.*

MURRAY *v.* REEVES, T. T. 1828. K. B. 8 *B. & C.* 421.

A contract made with an opposing creditor, that he should receive a certain sum, is void.

THE declaration stated, that one Alexander Shearer was indebted to the plaintiff; that Shearer was a prisoner in the King's Bench Prison for debt, and had petitioned the Court for the Relief of Insolvent Debtors to be discharged from his imprisonment; that the plaintiff had opposed, and was about to oppose his discharge for the general benefit of his creditors; and that, in consideration that the plaintiff would withdraw his opposition to the said discharge, the defendant undertook and promised, &c.

The Court held, that an agreement, made in consideration that a creditor shall withdraw his opposition to an insolvent, is illegal, unless the same be made with the consent of the rest of the creditors.

3. *As to Scotland.*

PHILLIPS *v.* ALLEN, T. T. 1828. K. B. 8 *B. & C.* 477.

A plea of cessio bonorum in Scotland no discharge of a debt contracted here.

To an action of assumpsit, the defendant pleaded his discharge under a cessio bonorum in Scotland. On demurrer to the replication—

The Court held, first, that the discharge of a defendant in Scotland under the law there called the cessio bonorum is not pleadable in bar to an action of debt which arose in this country, unless it appear that the creditor has received a dividend, or otherwise claimed the benefit of that law; secondly, the mere appearance of the English creditor before the Scotch Court, and his opposing the debtor's discharge under the law of cessio bonorum, is not such a claiming by him of the benefit of that law as to deprive him of his right afterwards to sue the debtor in England.

See 1 *East*, 6; 2 *Id.* 453.

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4. *As to Wales.*

JONES *v.* NICHOLLS, E. T. 1829. C. P. 3 *M. & P.* 12.

The certificate of discharge of the officer, and seal of the Court, are sufficient evidence.

A COPY of an order of the Insolvent Debtors' Court, referring the matters of an insolvent's petition to be heard by the justices at sessions in Wales, in pursuance of the 7 Geo. 4, c. 57, s. 41, together with a copy of the affidavit of the service of the order upon the insolvent's creditors affixed to it with a pin (the latter only bearing the seal of the Court and the certificate of the proper officer), were tendered in evidence under the 76th section of the statute.

The Court held, that the certificate and seal on the copy of the affidavit was a sufficient verification of both documents.

(*b*) SINCE 1 & 2 VICT. c. 110.

KITCHING *v.* CROFT, M. T. 1840. Q. B. 4 *P. & D.* 339.

Although a party may be discharged for a debt under 20*l.*, still if he were in prison when the 1 & 2 Vict. c. 110 came into operation, the creditors may apply for a vesting order as to his effects.

A PRISONER had been taken in execution for a debt under 20*l.* The period of a year from his imprisonment expired in vacation. In the same vacation, on October 1, 1838, the Insolvent Act (1 & 2 Vict. c. 110) came into operation. On the 23rd of that month his creditor petitioned the Court, and on the 26th his estate and effects were vested by its order in the provisional assignee. On the 2nd of November, being the first day of Michaelmas term, the prisoner applied for and obtained his discharge under 48 Geo. 3, c. 123. On the 24th of November A. was appointed assignee by the Insolvent Court.

The Court held, that the real estate and effects of the prisoner became vested in A., notwithstanding his discharge.

DRURY *v.* HOUNSFIELD, M. T. 1840. Q. B. 11 *Ad. & E.* 101.

After petition and vesting order obtained, it is too late to procure the insolvent's discharge.

ON motion to discharge an insolvent out of custody, it appeared that a creditor, on his petition to the Insolvent Debtors' Court under 1 & 2 Vict. c. 110, s. 86, had obtained an order (s. 37) vesting the estate of his insolvent debtor in the provisional assignee.

The Court held, that such creditor was not bound, on the debtor afterwards tendering the amount of debt and costs, to assent to his discharge from custody; nor will this Court order such discharge as to the creditor's action on affidavit of tender and refusal.

XII. RELATIVE TO ACTIONS BY AND AGAINST THE ASSIGNEES, BEFORE 1 & 2 VICT. C. 110.

(*a*) PARTIES TO.

SPICER *v.* TODD, M. T. 1831. Ex. 2 *C. & J.* 165; S. C. 2 *Tyrw.* 172.

The assignee of an insolvent cannot sue in the names of trustees without indemnifying them*.

THE assignee of an insolvent sued in the name of trustees without their consent, having offered them an indemnity, and a Judge at chambers set aside the proceedings with costs; but the order was not made a rule of Court.

The Court held, that the Court might nevertheless rescind it; and said, that they could only stay the proceedings, and had no power to give costs; but the Court directed the proceedings to be stayed until an indemnity approved by the Master were given.

(*b*) DECLARATION.

FERGUSON *v.* MITCHELL, M. T. 1835. Ex. 2 *C., M. & R.* 687; S. C. 4 *D. P. C.* 513; S. C. 1 *Tyrw. & Gr.* 179.

Assignees need not be described formally as such, it suffices if it appears to be the fact.

THE declaration in debt by the assignees of J. W. B., an insolvent debtor, alleged that the defendant, on &c., was indebted to the said J. W. B , before he subscribed his petition and executed the assignment, in the sum of 20*l.* for goods sold and delivered by the said J. W. B. before he became insolvent, and alleged that the money was to have been paid to the said J. W. B. before he became insolvent, and that, by reason of the sum being unpaid, an action had accrued to the plaintiffs, the assignees. On special demurrer—

The Court held the declaration sufficient.

* Under 1 Geo. 4, c. 119, the provisional assignee has all the estate, real and personal, of the insolvent vested in him until he, by the order of the Court, conveys it to the assignee appointed after the party is declared entitled to his discharge:—Held, therefore, that he might maintain ejectment, in order to get possession of the real estate, and that no authority of the Insolvent Court, or of the major part of the creditors, was necessary. (*Doe* d. *Clark* v. *Spencer*, M. T., 1825, C. P., 3 Bing. 203; S. C. 2 C. & P. 79).

(*c*) Evidence.

Doe *d.* Threlfall *v.* Sellers, H. T. 1837. K. B. 6 *Ad. & E.* 328.

Where the insolvent petitioned under the 53 Geo. 3:—Held, that the 7 Geo. 4, did not make copies of the proceedings evidence*.

A certified copy of the assignment from the insolvent to the provisional assignee was put in under the seal of the Insolvent Debtors' Court. It was objected, that this was not sufficient proof of the assignment, as the insolvent was discharged in 1816, when the 53 Geo. 3, c. 102, was in force; but Lord *Denman*, C. J., admitted the evidence, giving the defendant leave to move to enter a nonsuit.

The Court held, that the assignment from an insolvent debtor discharged under the 53 Geo. 3, c. 102, to the provisional assignee, cannot be proved in the mode prescribed by the 7 Geo. 4, c. 57, s. 76.

Doe *d.* Ellis *v.* Harvey, M. T. 1837. K. B. 6 *Ad. & E.* 335; S. C. 2 *N. & P.* 402.

Aliter, where the petition was under 1 Geo. 4, c. 119.

In this case the Court held, that an assignment by an insolvent debtor to the provisional assignee, under the 1 Geo. 4, c. 119, is a proceeding of the Court as soon as it is executed; and a copy thereof, sealed with the seal of that Court, is made evidence by the 7 Geo. 4, c. 57, s. 76.

Delafield *v.* Freeman, M. T. 1829. C. P. 6 *Bing.* 294; S. C. 3 *M. & P.* 704; S. C. 4 *C. & P.* 67.

Under the 7 Geo. 4, the assignee's title was proved by shewing the order of discharge and certified copies of the assignment.

In an action by the assignee of an insolvent debtor, certified copies of the assignments, and the order of the Court for the discharge of the prisoner, were produced in evidence.

The Court held them sufficient to prove the title of the assignee, and that the prisoner was discharged under the act; and it is not necessary to prove the insolvent's petition, in order to shew that the Insolvent Court had jurisdiction.

* Certified copies, although made evidence for the insolvent or his creditors, yet semble are not so for other persons, nor against him; but if the original schedule, and his handwriting thereto, be proved, it would be evidence against him; his not putting a debt due to him in his schedule is conclusive against him in an action to recover it. (*Nicholls* v. *Downes*, M. T. 1830, N. P., 4 C. & P. 330).

The provisions of the 7 Geo. 4, c. 57, s. 76, making the copy of the petition, schedule, order, &c., signed by the officer, and sealed with the seal of the Court, evidence of the same, is only permissive in the party to give another kind of evidence than the original instrument, but does not prevent the party from putting in evidence original documents. (*Northam* v. *Latouche*, 1829, N. P., 4 C. & P. 140).

The Insolvent Act, requiring that the petition shall be subscribed by the prisoner and filed, and a certified copy admitted as legal evidence:—Held, that it must be presumed to have been regularly done, and such copy, therefore, a sufficient proof of an allegation, in a declaration for a libel, that a petition subscribed by the plaintiff as such prisoner had been duly filed, &c. (*Gould* v. *Hulme*, 1829, N. P., 3 C. & P. 625).

In an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded, first, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors' Act, of which the plaintiff, at the time of the indorsement, had notice; and second, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which, at the time of the indorsement, the plaintiff also had notice. The plaintiff, in his replication, denied the notice stated in each of the pleas:—Held, that, on these issues, the defendant must begin, and that the onus of proving that the plaintiff had notice was on the defendant. (*Warren* v. *Haines*, M. T. 1834, N. P., 6 C. & P. 666).

DOE *v.* STORY, H. T. 1838. K. B. 3 *N. & P.* 107.

IN ejectment—

The Court held, that, under the 7 Geo. 4, c. 57, the assignment from the provisional assignee of an insolvent debtor to the assignee of the creditors, in the form pointed out by the schedule for the provisional assignment, is valid, and admissible in evidence.

The assignment by the provisional assignee to the creditor's assignee is evidence, in ejectment by the assignee*.

PEACOCK *v.* HARRIS, T. T. 1837. K. B. 6 *N. & M.* 854.

ON an issue, whether an insolvent debtor had executed a certain deed before he went to prison, with a view to petitioning the Court for his discharge—

The Court held, that his schedule, filed in the Court four months after he had executed the deed, was not admissible in evidence in an action by the assignee against a party claiming under the deed.

The schedule of an insolvent not evidence to prove a previous assignment.

(*d*) WITNESSES.

RIPLEY *v.* THOMPSON, H. T. 1827. C. P. 12 *Moore*, 55.

G., A PARTY to whom goods were originally sold, having become insolvent, the action was brought against the defendants, for whom, in fact, they were bought, and who were in partnership with G.

The Court held, that (without a release) he was an incompetent witness, on the part of the plaintiff, to shew the liability of the defendants, having a direct interest to render others liable as well as himself.

An insolvent co-contractor is an incompetent witness for plaintiff to fix his co contractors.

DELAFIELD *v.* FREEMAN, M. T. 1829. C. P. 4 *Bing.* 294; S. C. 3 *M. & P.* 704; S. C. 4 *C. & P.* 67.

THIS was an action against the defendants for negligence in preparing a lease for the insolvent, whereby property, which the insolvent would otherwise have obtained under the lease, was lost to the estate, by reason of the lessor not being in a situation to grant a lease. The defendant pleaded the general issue. At the trial before Lord Chief Justice *Tindal*, the insolvent was then called as a witness on behalf of the plaintiff, and offered to release any claim he might have to the surplus of his estate.

The Court held, an insolvent debtor is not a competent witness in an action brought by his assignee, notwithstanding he releases his interest to the surplus of his estate.

So, an insolvent cannot, by releasing his surplus, be a competent witness for his assignee†.

* The provisional assignment from the insolvent to the provisional assignee must be proved. (*Jeffery* v. *Robinson*, H. T. 1832, N. P., 5 C. & P. 230).

† Questions may be put on the voir dire to a witness by the party who calls him, in order to shew his competency, though no question has been asked by the opposite counsel to shew a disqualification, the objection being founded on the opening speech. (*Perryman* v. *Steggall*, H. T. 1832, N. P., 5 C. & P. 197). An insolvent is not competent, in an action by his assignees, to recover money which ought to go to the general estate, since he has an immediate interest in getting it into their hands. (*Rudge* v. *Ferguson*, 1 C. & P. 253). So, an insolvent debtor is not a competent witness for the plaintiff in an action by his assignee, to recover a sum due for work done by him before his insolvency. (*Wilkins* v. *Ford*, T. T. 1826, N. P., 2 C. & P. 344).

(*e*) Staying proceedings.

Doe *d.* Spencer *v.* Clark, H. T. 1826. C. P. 3 *Bing.* 370.

The Court will not stay proceedings on the suggestion, that the provisional assignee is suing without proper authority.

On motion to stay proceedings, it appeared that the provisional assignee of the Insolvent Debtors' Court had brought an action of ejectment, under the stats. 1 Geo. 4, c. 119, s. 11, and 3 Geo. 4, c. 123, s. 2.

The Court held, it was not necessary for him, previously to commencing the suit, to obtain the consent of the major part of the creditors of the insolvent, or approbation of one of the commissioners, or order of the Court, as provided by the 11th sect. of the former, and 2nd sect. of the latter act, and refused to stay the proceedings.

XIII. RELATIVE TO THE INSOLVENT IN CASE OF BANKRUPTCY, BEFORE 1 & 2 Vict. c. 110*.

XIV. RELATIVE TO THE REMAND, BEFORE 1 & 2 Vict. c. 110.

Buzzard *v.* Bousfield, M. T. 1838. Ex. 4 *M. & W.* 368; S. C. 7 *D. P. C.* 1.

An insolvent, remanded by the Insolvent Court for sixteen months, is not supersedeable for not being charged in execution by the creditor at whose suit he was remanded.

The defendant petitioned for his discharge under the "Act for the Relief of Insolvent Debtors," and, upon being brought up, was discharged upon the 12th of May, as to all debts except the plaintiff's and one other; and as to them, after he had been in custody sixteen months. The plaintiff had not then commenced any action against him; but upon the same day lodged a writ of detainer, but did not declare before the end of the next term.

The Court held, that sect. 15 of the above act applied to actions commenced after the adjudication as well as to those commenced before, and that the defendant was not supersedeable under the Rule of Trinity Term, 3 Will. 4, as the plaintiff was not bound to declare before the end of the next term after such detainer.

Ashley *v.* Killick, M. T. 1839. Ex. 5 *M. & W.* 509.

Securities, given by an insolvent to procure his discharge from a remand, cannot be enforced.

In assumpsit, it appeared that the defendant, an insolvent debtor, was remanded for six months at the suit of G. Before the six months had elapsed he was discharged, upon his giving the attorney for G. a bill of exchange for part of G.'s debt, and an I. O. U. for the costs of the action.

* Under the 6 Geo. 4, c. 16, s. 13, the insolvent filing a petition is an act of bankruptcy from the period of actually filing. (*Garlick* v. *Sangster*, 9 Bing. 46; abridged, ante, tit. *Bankrupt.*) If a commission of bankrupt issue before the insolvent's discharge, he will be remanded, and required to execute an assignment of all his effects scheduled, subject to the commission, and debts under it. (*Nunney* v. *Hall*, C. P., 8 Moore, 423).

The Court held, as to the bill of exchange, that it was a new security for the old debt; and as to the I. O. U. that the costs being a debt due to G., and not to the attorney, that also was a new security for a debt barred by the statute; therefore, that no action could be maintained.

XV. RELATIVE TO THE INSOLVENT, BEFORE 1 & 2 VICT. c. 110.

(*a*) RIGHTS OF.

PARTINGTON *v.* WOODCOCK, T. T. 1835. K. B. 5 *N. & M.* 672.

An insolvent, who, by permission of his assignees retains possession of premises, and lets them, may sue for the rent, notwithstanding a notice from the assignees to pay the rent to them*.

To an action of debt for rent, a plea admitted the demise by the plaintiff, and stated, that afterwards the plaintiff petitioned the Court of Insolvent Debtors; and that an assignee was appointed, to whom the premises were assigned; and that the plaintiff, having been permitted to remain in possession, and authorized by the assignee to demise, afterwards the assignee gave notice to the defendant to pay the rent to him, by reason whereof he became liable to pay to the assignee. On special demurrer—

The Court held the plea bad, for as upon the plea it was admitted that the demise by the plaintiff still existed, and as there was no direct allegation that the demise was made by the plaintiff, as agent to the assignee, the defendant was not at liberty to set up the title of the assignee against the claim of the plaintiff under the demise.

(*b*) LIABILITY OF.

BROWN *v.* FLEETWOOD, E. T. 1839. Ex. 5 *M. & W.* 19; S. C. 7 *D. P. C*, 387.

An insolvent, after his discharge, may be sued for money conditionally paid by him for the purchase of a business.

A. AGREED to purchase of B. his business, on the terms of paying down 200*l.*, and a further sum at a future day, with a power to A. to abandon the contract within a year and a half upon a month's notice to B., when he was to repay A. 50*l.*, and the contract to be void. Before the year and a half had expired, B. became insolvent, and was discharged under the act. After his insolvency, and within the specified time, A. gave notice of abandonment, and afterwards brought an action against B. for the 50*l.*, to which he pleaded his discharge.

The Court held, that this plea was no bar to the action, as this was not a debt capable of being ascertained or proved under 7 Geo. 4, c. 57, s. 51.

* A party who has given in a schedule on oath of all his debts and credits to the Insolvent Debtors' Court, cannot afterwards claim a debt not there stated). (*Nicholls* v. *Downes*, M. T. 1830, N. P., 1 M. & Rob. 13).

(*c*) Actions by and against.

1. *When maintainable**.

Doe *d.* Palmer *v.* Andrews, H. T. 1827. C. P. 4 *Bing.* 344; S. C. 2 *C. & P.* 593.

An insolvent cannot maintain ejectment, although the provisional assignee had not taken possession.

In ejectment, it appeared that the lessor of plaintiff, being himself tenant from year to year, with an agreement for a term after a demise to the defendant, was discharged under the Insolvent Act:—Held, *per Burrough* and *Gazelee*, JJ., contra *Best*, C. J., that, having assigned all his property to the provisional assignee, he had no legal estate in him to sustain an ejectment, although the provisional assignee had never taken possession, and the lessor had continued to receive the rents.

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2. *Of the Arrest*†.

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3. *Pleas.*

Freeman *v.* Burgess, M. T. 1827. C. P. 4 *Bing.* 416; S. C. 1 *M. & P.* 91.

Whether an insolvent be discharged will not be decided on motion; but the defendant must plead it.

The defendant, the grantor of an annuity, who had been discharged under the Insolvent Act, (1 Geo. 4, c. 119), was arrested by the plaintiff, his surety, for certain arrears of the annuity which had become due after his discharge, and which the plaintiff, as surety, had been obliged to pay. On motion to discharge the defendant out of custody, on his entering a common appearance—

The Court refused to interfere; but left him to defend the action, if he thought proper.

Bircham *v.* Creighton, T. T. 1835. C. P. 10 *Bing.* 11; S. C. 3 *M. & Scott*, 345.

Under 7 Geo. 4, c. 57, s. 46, a discharge must be pleaded, and cannot be given in evidence.

In an action against a defendant, who had taken the benefit of the Insolvent Debtors' Act, 7 Geo. 4, c. 57—

The Court held, he must plead his discharge under the statute; it cannot be given in evidence upon the general issue. In such case the Court will not allow the defendant to withdraw the plea of the general issue and plead specially, if they perceive upon the face of his schedule that he has not complied with the forms prescribed by the statute.

* An insolvent cannot maintain trover for any property he possessed previous to his discharge, unless they be necessaries. (*Lea* v. *Telfer*, H. T. 1824, N. P., 1 C. & P. 146).

† Where a party was in custody:—Held, that five days was a reasonable time for making an application to be discharged from custody on the ground of his being free from arrest, as having been discharged under the act; and that describing himself in the affidavit as having been arrested and still in custody of the sheriff, was sufficient; held also, that having inserted in the schedule the grant of an annuity and annual amount, it was sufficient to discharge him against arrears at the time of making out the schedule. (*Jervis* v. *Jones*, H. T. 1836, B. C., 4 D. P. C. 610).

GOULD *v.* LARKBURY, T. T. 1834. Ex. 1 *C., M. & R.* 254; S. C. 2 *D. P. C.* 707; S. C. 4 *Tyrw.* 863.

In a plea of the defendant's discharge from the debts and causes of action, the words, "if any," are a ground of demurrer*.

THE plaintiff declared in debt on simple contract; to which the defendant pleaded that he was discharged under the Insolvent Debtors' Act, "from the debts and causes of action, if any, and each and every of them." To this plea the plaintiff demurred specially, assigning for cause, that the said plea did not confess and avoid the cause of action, &c. &c., and that the plea neither set out the discharge specially, nor was pleaded generally, in the form given by the statute.

Per Cur.—The plea was contended to be bad, because it did not directly confess and avoid the matters alleged in the declaration, but merely stated the discharge from the said causes of action, "if any." A similar point having been argued in the King's Bench, we have conferred with the Judges of that Court on the subject, and we concur with them in thinking that the words vitiate the plea. The demurrer, therefore, must be allowed.

TROUP *v.* BOFFI, E. T. 1838. Ex. 3 *M. & W.* 615.

A plea of no notice of filing petition must state that the debt amounted to 5*l.*

TO an action of assumpsit, the plea was, a discharge from the cause of action under the Insolvent Debtors' Act. Replication that although the plaintiff was inserted in the schedule of the defendant, yet that he, the plaintiff, did not have any notice of the filing of the petition, or of the time appointed for the hearing upon it. Upon demurrer—

The Court held the plea bad, as it did not state that the plaintiff was a creditor to the amount of 5*l.*, and it therefore did not appear that he was entitled to notice under the 42nd sect. of 7 Geo. 4, c. 57.

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4. *Replication.*

SWAN *v.* SUTTON, T. T. 1839. Q. B. 2 *P. & D.* 535.

Plea of plaintiff's discharge since the commencement of the suit. Replication, that the action was carried on for the benefit of the assignees:—Held bad.

TO a declaration in assumpsit the defendant pleaded that after the commencement of the suit the plaintiff became insolvent, and executed an assignment to a provisional assignee, and the replication stated that the provisional assignee had notice of the suit, and permitted it to be carried on in the name of the plaintiff, and that the assignees subsequently appointed also permitted it to be so carried on. On demurrer to the replication—

The Court held, that the plea was a good defence to the action.

LEARMONTH *v.* GRANDINE, H. T. 1839. Ex. 4 *M. & W.* 658.

To a plea of an accounting before the insol-

IN assumpsit by the assignee of W., an insolvent, the first two counts were for money had and received to the use of W. and A., and upon an account stated between them and the defendant. One plea

* Where, on a plea of discharge under the Insolvent Act, in an action on a bill of exchange, it appeared that there were no other outstanding bills of like date or amount; but the names of the drawer and acceptor in the schedule were transposed, the Judge left it to the jury to say, if they thought the bill declared on, and that intended to be described in the schedule, were the same, and if so, whether the misdescription was intended to deceive or mislead the holder, and likely to produce that effect. (*Nias* v. *Nicholson*, M. T. 1825, N. P., 1 Ry. & M. 323).

vency and allowance of a debt due to the defendant, and set-off and discharge of the premises in the declaration, a replication that the insolvent was not indebted modo et formâ, is good.

was, as to 451*l.* 18*s.* parcel of the monies in those counts mentioned, that after making the promises in the declaration mentioned, and before the said W. subscribed his petition, W. and A. were indebted to the defendant in 490*l.* 15*s.* for money lent, paid, had and received, and for interest, and an account was then had and stated between W. and A. and the defendant concerning the monies in that plea mentioned, in which W. and A. were indebted to the defendant, as in that plea mentioned, and of and concerning the said sum of 451*l.* 18*s.* parcel &c., and the defendant then set off and allowed to W. and A. the said sum of 451*l.* 18*s.* parcel &c. out of the monies so due to the defendant as in that plea mentioned, and then exonerated and discharged W. and A. from the payment of 451*l.* 18*s.* parcel &c. of the monies so due from the said W. and A. to the defendant, in full satisfaction and discharge of the promises in those two counts mentioned as to the said sum of 451*l.* 18*s.* parcel &c., and of all damages by W. and A. sustained by reason of the non-performance thereof, which same set-off and allowance W. and A. then accepted and received of and from the defendant in full satisfaction and discharge as aforesaid. Replication, that W. and A. were not indebted to the defendant in manner and form as the defendant hath above in his said plea in that behalf alleged. Upon special demurrer—

The Court held, that the replication amounted to a traverse of the whole plea.

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5. *Evidence**.

NEAL *v.* ISAACS, T. T. 1825. K. B. 4 *B. & C.* 335; S. C. 6 *D. & R.* 464.

The order to the goaler to discharge an insolvent out of custody, is evidence of the discharge under 53 Geo. 3, in case of subsequent bankruptcy.

AN original order for the discharge of the prisoner, made by the Court for the Relief of Insolvent Debtors, and delivered to the gaoler, in whose custody he was, who thereupon discharged him, and produced the order at the trial—

The Court held the order was evidence of his discharge according to 53 Geo. 3, c. 102, s. 10, so as to make his future property liable to creditors upon his subsequent bankruptcy, where his estate did not pay 15*s.* in the pound, though no copy of such order of discharge, signed and certified by the officer of the Court, was produced according to 53 Geo. 3, c. 102, s. 24; or 1 Geo. 4, c. 119, s. 45.

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6. *Costs*†. See also, ante, tit. *Costs*.

* If, in assumpsit, the defendant plead his discharge under the Insolvent Debtors' Act, and no other plea, and the plaintiff, by his replication, deny the plea, the defendant must begin. (*Lambert* v. *Hale*, 1840, N. P., 9 C. & P. 506). On a general plea of discharge, under the Insolvent Act, the replication denying the discharge:—Held, that the filing of the petition not being in issue, need not be proved. (*Andrews* v. *Pledger*, H. T. 1830, N. P., 4 C. & P. 274). So, where defendant pleaded his discharge under the Insolvent Act, under 1 Geo. 4, c. 119: —Held, not to be necessary to prove the affidavit of notice, as it must have been proved in Court before he could have obtained his discharge; held also, that it was a question for the jury to say, whether a variance in the party's residence and description in his schedule was done with a fraudulent motive to mislead, and also whether the description given was not such as would have enabled a person, using reasonable care, to find out the residence. (*Pascall* v. *Brown*, 1819, N. P., 3 Stark. 54).

† Arresting an insolvent for a debt, the greater part of which is discharged by the Insolvent Act, entitles the defendant to costs, under the 43 Geo. 3. (*Lord*

7. *Staying Proceedings.*

COOK *v.* TOWNSEND, M. T. 1830. C. P. 5 *M. & P.* 12.

When a creditor states he shall proceed no further, and then signs judgment, execution will be stayed.

THE plaintiff, when informed of the insolvency of the defendant, said he should not proceed in the action, and the defendant afterwards suffered judgment by default.

The Court held, that, under the circumstances, they would stay the execution, although the discharge had not been pleaded under 7 Geo. 4, c. 57, s. 64, without giving any opinion whether that section applied only to judgments obtained before the discharge.

(*d*) INDICTMENT AGAINST*.

XVI. RELATIVE TO NEWLY ACQUIRED PROPERTY, BEFORE 1 & 2 VICT. c. 110.

BROWNING *v.* PARIS, E. T. 1839. Ex. 5 *M. & W.* 117; S. C. 7 *D. P. C.* 398.

Under the 53 Geo. 3, the right reserved to creditors of payment out of future effects, does not prevent the operation of the Statute of Limitations.

PLEA, Statute of Limitations. Replication, that Reid, after the making of the promises in the declaration mentioned, was actually a prisoner in the custody of the Marshal, &c. at the suit of the plaintiff and other creditors, on the 5th of June, 1812, mentioned in the act for the relief of insolvent debtors, passed in the 52nd year of the reign of Geo. 3, intituled "An Act for the Relief of certain Insolvent Debtors in England;" and afterwards, at the quarter sessions for the county of Surrey, applied to be discharged under the said act, and the justices at such sessions did adjudge the said Reid to be entitled to the benefit of the said act, and ordered the said Marshal to set at liberty the said Reid; that afterwards, and after the death of Reid, and within six years next before the commencement of this suit, to wit, on &c., divers goods and chattels of great value, to wit, of the value of the damages sustained by them, the plaintiffs, by reason of the non-performance of the promises in the said declaration mentioned, (the said goods and chattels not being or having been part of the necessary apparel, &c. of Reid, but which goods were and are part of the future estate and effects of the said Reid, within the meaning of the statute aforesaid), came to the hands of the defendants as executors aforesaid, to be administered, and which said goods and chattels were and are the first and only part of the future estate of the said Reid which ever came to the hands of the defendants as executors as aforesaid, to be administered within the meaning of the

Huntingtower v. *Heeley*, T. T. 1825, K. B., 6 D. & R. 359). If an insolvent debtor proceeds with an action, after executing his assignment, although no assignees are appointed, the Court will compel him to find security for costs. (*Doyle* v. *Anderson*, T. T. 1834, B. C., 2 D. P. C. 596).

* Where, after an acquittal on an indictment against an insolvent for omitting specified articles out of his schedule, a second was preferred, in substance the same, but including the omission of additional articles:—Held, that the plea of autrefois acquit was not a good defence to the whole of the latter indictment; but the Judge strongly advised the jury to acquit, unless they were satisfied that the omission was under essentially different circumstances. (*Reg.* v. *Champney*, 1836, N. P., 2 M. & Rob. 26).

said statute. Demurrer, that the replication confesses, but does not avoid, and that it does not allege that Reid in his lifetime, and after he took the benefit of the act, had not any future estate and effects, and that the said statute did not save the cause of action in the declaration mentioned from the effect of the Statute of Limitations.

The Court held, that the Insolvent Debtors' Act (53 Geo. 3, c. 163), did not keep alive a debt of the insolvent, which would otherwise be barred by the Statute of Limitations.

XVII. RELATIVE TO NEW SECURITIES, GIVEN BEFORE 1 & 2 Vict. c. 110*.

Sweenie *v.* Sharp, M. T. 1826. C. P. 4 *Bing.* 37; S. C. 12 *Moore*, 163.

A cognovit is a new security.

A party, after being discharged under the Insolvent Act, gave a cognovit for a prior debt—

The Court held, that it was tantamount to a new agreement, which he must be taken to have made voluntarily, and on which he was therefore liable.

Sherman *v.* Thompson, E. T. 1840. Q. B. 3 *P. & D.* 656.

A security given for an old and new debt is divisible—bad as to the former, but good as to the latter.

The defendant made and indorsed a bill of exchange to the plaintiff for 11*l.* 14*s.* 6*d.* Defendant was afterwards discharged under the Insolvent Act. After his discharge, the plaintiff made a bill of exchange, which was accepted by the defendant, the consideration for which was the above sum of 11*l.* 14*s.* 6*d.*, and a sum of 6*l.* 10*s.* due from the defendant to the plaintiff for goods supplied since the discharge.

The Court held, that a plea of discharge under the stat. 7 Geo. 4, c. 57, s. 61, was improperly pleaded to the whole cause of action in respect of the bill, as it was only an answer to part of it, namely, to the sum of 11*l.* 14*s.* 6*d.*, the amount of the old debt.

Deane *v.* Knott, H. T. 1841. Ex. 9 *D. P. C.* 224; S. C. 7 *M. & W.* 143.

But where a bond was given for an old and a new debt, and the insolvent taken in execu-

The defendant being indebted to the plaintiff in the sum of 80*l.*, petitioned the Court for the Relief of Insolvent Debtors for his discharge, inserted the plaintiff's debt in his schedule, and was discharged accordingly. Being afterwards arrested for a new debt, the plaintiff agreed to become his bail on receiving from him a bond for

* Before the 1 & 2 Vict. c. 110, to have revived a party's liability, from which he had been discharged by the bankrupt or insolvent laws, the evidence of a subsequent promise must have been clear and distinct. (*Brook* v. *Wood*, 13 Price, 667).

If a bill of exchange is given by an insolvent, after his discharge, for a debt included in his schedule, and in pursuance of an agreement made before his discharge, for withdrawing an intended opposition, the defendant cannot be held to bail upon it. (*Gould* v. *Williams*, T. T. 1835, B. C., 4 D. P. C. 91). And where the insolvent, after his discharge, had signed a bill for the old debt, which had been indorsed to the plaintiff for full value:—Held, that, in order to entitle the plaintiff to recover, the jury must be satisfied he took it bonâ fide, and without being conscious of the latent defect, and for his own purposes. (*Northam* v. *Latouche*, M. T. 1829, N. P., 4 C. & P. 140).

300*l.*, and under which the old debt of 80*l.* was secured. The plaintiff sued the defendant on this bond, signed judgment for want of a plea, and arrested him on a ca. sa.

tion, the Court refused to discharge him.

The Court held, that the defendant was not entitled to be discharged out of custody.

PHILPOT *v.* ASLETT, T. T. 1834. Ex. 1 *C., M. & R.* 85.

So, after an insolvent's discharge, he gave a bill for the old as well as a new debt, and then a warrant of attorney*, the Court refused to set it aside.

THE defendant, after his discharge by the Insolvent Act, contracted another debt to the plaintiff, and gave him a bill of exchange for the balance then due upon an account, including the debt incurred before his discharge. Being sued upon the bill, the defendant did not defend the action, but gave a warrant of attorney for the amount of the bill and the costs of the action. Upon this warrant of attorney judgment was entered up.

Per Cur.—A bill of exchange was accepted by the defendant after his discharge under the Insolvent Act for the balance due upon both the old and new account. Upon that bill an action is brought, and the defendant has the opportunity of pleading his discharge. Instead of availing himself of the defence which the act points out and allows, he chose to give a warrant of attorney, and now seeks to set aside the judgment upon that warrant of attorney. He has lost his proper opportunity, and we ought not to assist him.

KAY *v.* MASTERS, T. T. 1831. B. C. 1 *D. P. C.* 86.

Although the Court may order the insolvent to be discharged out of custody on a new security, if in the hands of a bonâ fide holder, they will not order the security to be given up.

IN an action on promissory notes, it appeared that the insolvent gave promissory notes for a debt (stated in the schedule) to an opposing creditor (an attorney) to induce him to withdraw his opposition, which he did, and the notes were afterwards indorsed to the plaintiff, bonâ fide, and in ignorance of the consideration for which they had been given, who arrested the defendant thereon.

The Court held, that the debt being due in respect of which he would have been entitled to have been discharged as against the then creditor, he was entitled to have the bail-bond delivered up to be cancelled; but that the notes having been obtained in the character of a creditor, and not of an attorney, although for work and labour as such, the Court would not compel him to deliver them up.

EVANS *v.* WILLIAMS, M. T. 1832. Ex. 1 *C. & M.* 30; S. C. 3 *Tyrw.* 226.

However, an insolvent cannot be sued upon a new security given in respect of a debt from which he was discharged, although given

A PROMISSORY note, given by an insolvent after his discharge for the amount of a promissory note given before such discharge, in order to prevent the surety therein from being sued.

Per Cur.—The defendant, after his discharge, executed a new note, including the same sum of money, and for the same debt for which he was before liable, and had been discharged. The stat. 7 Geo. 4, c. 57, s. 61, enacts, that no action shall be brought for "any debt or sum of money, or upon any new contract or security

* But in another case, where, after the insolvent's discharge, he gave a warrant of attorney to a creditor for the debt, and a fresh advance of goods, the Court set aside the execution thereon as to the old debt. (*Smith* v. *Alexander*, E. T. 1836, B. C., 5 D. P. C. 13).

to a surety to indemnify him.

for the payment thereof," with respect to which the party shall have become entitled to the benefit of the act. Now, is not this a new contract for the payment of the same debt or sum of money? The only new ingredient is an additional consideration thrown in. We cannot set aside the nonsuit.

Inspection.

See, also, tit. *Evidence,* and particular titles.

PONTET *v.* BASINGSTOKE, H. T. 1836. C. P. 2 *Bing. N. S.* 370; S. C. 2 *Scott,* 543.

A creditor is entitled to inspect the books of a public company, where the act of incorporation entitles proprietors and others interested to do so*.

IN this action, brought to recover three sums of money advanced to the company by the plaintiff, the company pleaded, amongst other pleas, that their funds would not enable them to discharge the debt due to defendant, unless they gave him a priority which by their charter they could not do. A rule was obtained, calling on the company to admit the plaintiff, at his own expense, to inspect their books in respect of the matters contained in their pleas, upon an affidavit that such inspection was necessary to the conducting of the plaintiff's cause. In support of the rule, the attention of the Court was called to 18 Geo. 3, c. lxxv, local and personal, by which the company were incorporated, which enacted, that "proprietors, landowners, and others interested in the said navigation should be allowed to inspect the books;" it was contended, that creditors of the company were within the equity of the statute, as it could not be denied that they were interested in the navigation.

And the Court made the rule absolute.

HEWITT *v.* PIGOTT, H. T. 1831. C. P. 1 *D. P. C.* 219; S. C. 7 *Bing.* 400; S. C. 5 *M. & P.* 252; S. C. 5 *C. & P.* 75, *not* S. P.

On a new trial being granted, a party is only bound to grant inspection of documents produced at the first†.

AT the trial two deeds were produced by the defendant, one was given in evidence, and the other withdrawn. A new trial being granted, application was made for a copy of the deeds.

Per Cur.—In this case there is a distinction as to the two deeds, one was read in evidence, and the Court and jury heard it. No injustice will, therefore, be done by compelling the defendant to produce to the plaintiff, and allow him to copy that deed, for it would have been fair to impose it as a term of the rule for the new trial; but with regard to the other, that was not in evidence; its execution was admitted, but the defendant withdrew it. Of that the plaintiff is not in justice entitled to a copy. Until the trial one party has, in general, no right to see the documents of the other.

* But an inspection will not be ordered of a paper relied on as an answer to the action, and which was alleged by the plaintiff to be a forgery. (*Jessel* v. *Millingen,* M. T. 1832, C. P., 1 M. & Scott, 605).

† The plaintiff, as assignee, charged the defendant with certain contracts with W. his partner, since a bankrupt:—Held, that the defendant was entitled to inspection of books, &c., in the plaintiff's possession. (*Whitbourne* v. *Pettifer,* E. T. 1833, C. P., 4 M. & Scott, 182.

Insurance.

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I. RELATIVE TO INSURANCE AGAINST FIRE.

(*a*) Of the property insurable.

Sun Fire Office and Wright, *In re*, T. T. 1834. K. B. 3 *N. & M.* 819; S. C. 1 *Ad. & E.* 621.

The profits of a business may be insured, if so specified in the policy*.

A policy of insurance recited that Wright had insured with the Sun Fire Office Company, on (among other things) his stock, utensils, and goods, in trust, in the Ship Inn and offices at Dover, only 2,500*l.*, and on his interest only in the said Ship Inn and offices

* In a policy of insurance on premises of a certain description, "where no fire is kept, and no hazardous goods are deposited," these words must be understood of the *habitual* use of fire, and deposit of hazardous goods. (*Dobson* v. *Sotheby*, T. T. 1827, N. P., 1 M. & M. 90).

1,000*l.*, and that he took out a policy to that effect. Wright claimed 450*l.* for the loss "sustained in his business as an innkeeper, by not being able to occupy the inn and offices during the time that elapsed between the fire and the rebuilding of the said premises."

Per Cur.—The policy was not intended to cover the *profits* of the business. We think that profits are insurable, but they must be insured *quâ* profits. A party is not entitled to compensation for loss of profits, under an insurance of his "interest in the Ship Inn."

(*b*) Of the premium.

Acey *v.* Fernie, M. T. 1840. Ex. 7 *M. & W.* 151.

A clerk at an insurance office receiving a premium after the limited time does not bind the office.

In an action on a policy of insurance, it appeared that the agent of an insurance company, after the expiration of fifteen days after the time for payment of the premium, and without the authority of the company, received the amount.

The Court held, that, his authority being limited to receive premium, and not to make contracts for the company, he could not, by such receipt, raise a new contract, binding on his principals, and revive the policy; and that an arrangement between the company and the agent, that he should be debited as if the premiums were paid, if he failed in giving notice within the fifteen days, it being only a means of keeping their agents in order, did not enable a third party, the assured, to avail themselves of it as a payment within the original time fixed by the policy.

(*c*) Of the construction of the policy.

Whitehead *v.* Price, T. T. 1835. Ex. 2 *C., M. & R.* 447.

An insurance on a cotton mill, with a steam engine, described as "worked by day only," applies to the working of the mill.

In covenant, on a policy of insurance against fire on certain cotton mills, millwright's work, including standing and going gear therein, engine-house adjoining, and the steam-engine thereon, &c., it was recited that the "buildings were brick-built and slated, warmed exclusively by steam, lighted by gas, &c., worked by the steam-engine above-mentioned, in the tenure of one firm only, standing apart from all other mills, and worked by day only."

The Court held, that the words, "worked by day only," referred to the mill only, and not to the steam-engine, or any part of the gear; and that it was no breach of the policy that the steam-engine was kept going by night, and that some parts of the machinery were turned by it, the cotton mill not being worked except by day only.

(*d*) Of the forfeiture of the policy.

Shaw *v.* Robberds, T. T. 1836. K. B. 1 *N. & P.* 279; S. C. 6 *Ad. & E.* 75.

A party, by allowing gratui-

This was an action upon an insurance policy against fire, upon a dwelling-house and a kiln attached to a granary for drying corn.

tously bark to be dried at his kiln, from a sunken vessel near his premises, does not thereby avoid the policy.

It appeared that a cargo of bark having been sunk near the premises, the plaintiff had permitted it to be dried gratis at his kiln, in the course of which the fire occurred.

The Court held, that such single act did not amount to an alteration in the business, of which, by one of the conditions, notice was to be given, or a misdescription in the policy of the trade carried on, although the jury found that corn drying and bark drying are different trades, and that the latter was more dangerous than the former; that there was nothing in the policy amounting to an express warranty that nothing but corn should ever be dried in the kiln; and, lastly, that, in the absence of all fraud, there is no distinction between the fire having been occasioned by the negligence of servants or strangers, or of the assured himself.

(*e*) Of covenants to insure*.

(*f*) Pleas.

Mayall *v.* Milford, M. T. 1836. K. B. 1 *N. & P.* 732.

The defendants may plead that a mill insured was worked by night, and not by day.

In an action on a policy of insurance, it appeared that the policy contained a warranty that the mills insured should be worked by day only. Upon a plea, in an action that the mill was worked by night, and not by day only—

The Court held, 1st, that it was to be confined to the usual manufacture carried on therein, and that it was no breach of the warranty that a steam-engine in the mill had on one occasion been used at night to turn machinery in an adjacent building; and, 2ndly, that a plea that a certain steam-engine and shafts, "these being respectively parts of the said mills," were worked at night, was bad.

(*g*) Evidence.

Doe *d.* Bridges *v.* Whitehead, T. T. 1838. K. B. 3 *N. & P.* 557.

Refusal by defendant to pro-

In ejectment on a forfeiture, for a breach of covenant to insure, it was proved that, in 1835, the lessor of the plaintiff applied to the

* Ejectment on a forfeiture, for breach of covenant in a lease, wherein the lessee covenanted to insure in the joint names of himself and the lessor, and in two-thirds of the premises demised. The lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value of the premises. Both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be in two-thirds of the value of the premises. The lessor of the plaintiff had previously insured the premises at the same sum as the defendant:—Held, that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude he was doing all that was necessary or required of him, by insuring in his own name, and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release from the covenant. (*Doe* d. *Knight* v. *Rowe*, H. T. 1826, N. P., 1 Ry. & M. 343).

defendant to shew him his policy of insurance, which the latter declined; and notice having been given to produce it on the trial of the cause, it was called for, but not produced. *Littledale*, J., expressed an opinion that it was for the defendant to prove that he had insured the premises; but having left that fact, as also the state of the repairs to the jury, they found a verdict for the defendant.

Per Cur.—Proof that the lessor called upon the lessee, and asked to see the policy, when the latter refused to shew it, together with its non-production at the trial, after notice to produce, is not primâ facie evidence of the forfeiture.

duce the policy is not of itself evidence that he had not insured.

(*h*) Witnesses.

FRIEDLANDER *v.* LONDON ASSURANCE COMPANY, M. T. 1832. K. B. 4 *B. & Ad.* 193; S. C. 1 *N. & M.* 30.

ASSUMPSIT on a policy of insurance against fire. To prove that the goods (the value of which the plaintiff claimed in this action) were in the plaintiff's house at the time when the fire happened, witnesses were called, and an invoice and letters were put in, purporting to be the original invoice of a quantity of goods sold to the plaintiff, and the letter relating thereto from the seller. The witness (the supposed seller) however, upon cross-examination, contradicted himself. It was proposed to call witnesses to discredit his testimony, but Lord *Tenterden*, C. J., rejected the evidence. On motion for a new trial—

A witness for plaintiff, to prove his interest in the goods insured, stated, in his examination in chief, matters which supported the plaintiff's right, but on cross-examination made a different statement:—Held, the plaintiff might contradict him.

Per Cur.—There is no doubt of the general rule of law, that a party may contradict his own witness in a particular fact, material to the issue in the cause, but that he cannot as to a collateral fact, as that would go to discredit the witness, and tend to let in many issues. Are, then, these collateral facts? Whether the invoice was fabricated or not, was not in itself material to the issue; but when connected with the letter, it became an important question, in order to establish a bonâ fide sale of goods contained in it.—On this ground, we are of opinion that the rejection of the witness was improper.

II. RELATIVE TO INSURANCE ON LIVES.

(*a*) Of the interest to ground the insurance.

HALFORD *v.* KYMER, E. T. 1830. K. B. 10 *B. & C.* 724.

COVENANT on a policy of insurance, whereby the directors of the Asylum Life Insurance Company agreed with the plaintiff to insure the life of the son of the plaintiff in the sum of 5,000*l.*, for the term of two years. The defence pleaded and relied upon was, that

The word "interest," in 14 Geo. 3, c. 48, s. 1, means pecuniary interest*.

* Where the debtor had agreed to pay his debt by instalments, in five years:—Held, that his creditor had an insurable interest in his life during that period. (*Lindenau* v. *Desborough*, M. T. 1828, K. B., 8 B. & C. 586; S. C. 3 C. & P. 353). Where A., having no interest in the life of B., induces him to cause a policy of insurance to be effected in his (B.'s) name, A. finding the funds for the premiums, and intending, by assignment or otherwise, to get the benefit of the policy himself, so that it is substantially the policy of A., such policy is void, as a fraudulent invasion of the stat. 14 Geo. 3, c. 48, ss. 1 and 2. Every man is presumed

the plaintiff had no interest in the life of his son, at the time either of the insurance or of the death.

The Court held that, in order to render a policy valid within the meaning of the act, the party for whose benefit it is effected must have a pecuniary interest in the life or event insured; and that, therefore, a policy effected by a father in his own name, on the life of his son, he not having any pecuniary interest therein, was void.

(*b*) OF THE CONSTRUCTION OF, AND OF CONCEALMENT.

HUCKMAN *v.* FERNIE, M. T. 1837. Ex. 3 *M. & W.* 517.

The "medical man" means the usual medical attendant.

IN an action on a policy of insurance, effected by the husband on the life of his wife, it appeared that she had been sent to the office to be examined, and had given general answers to the printed questions; and the jury found that the husband had no personal knowledge.

The Court held, that the allegations in a plea, as to the husband's knowledge of certain facts material to be disclosed, could not be considered as allegations that he had knowledge through the wife as his agent; but it appearing that, before her marriage, she had been long attended by a medical person, who ceased to be so upon her marriage, and subsequently the husband's usual family attendant had prescribed for her once or twice on slight indispositions, and she, to the inquiry who was her usual medical attendant, had given the name of the latter:—Held, that it ought to have been left to the jury to say if he could be considered her medical attendant at all; and that if, in answering the question, she was aware that he could not be the proper person to give the account the office were desirous of obtaining, the answer must have been intended to deceive; and a new trial granted.

EVERETT *v.* DESBOROUGH, E. T. 1829. C. P. 5 *Bing.* 503; S. C. 3 *M. & P.* 190.

A reference to a medical man who had been, but was not at the time, vitiates the policy.

IN an action on a policy of insurance, it appeared that the plaintiff, being about to effect an insurance on the life of one H., and being applied to by the agent of the insurance office for information as to the state of health, &c., of H., said he knew nothing of him, but directed the agent to get the necessary information wherever he could. The agent accordingly applied to the wife, who made a false representation as to the medical man, by referring to one who did not attend at the time of effecting the policy.

The Court held, that the plaintiff was bound by the misrepresentation of the wife, though made without his knowledge, and that the policy was void.

MORRISON *v.* MUSPRATT, H. T. 1827. C. P. 4 *Bing.* 60; S. C. 12 *Moore*, 231.

So, an omission to state that during an inter-

IN an action on a policy of insurance, it appeared that a medical person had attended such person shortly before the execution of the policy, but which was not disclosed to the office, and he was not

to have an interest in his own life, and in every part of it; therefore, an executor suing on a policy effected by his testator on two years of his life is not bound to shew that such testator had any special reason for making such limited assurance. (*Wainwright* v. *Bland*, T. T. 1825, N. P., 1 M. & Rob. 481).

called as a witness in an action brought on the policy. The plaintiff had a verdict. On motion for a new trial—

vening period, a different medical man attended the party than the one signing the certificate, may vitiate the policy.

Per Cur.—It is not necessary to decide whether what was kept back or suppressed at the trial amounts to a material concealment, as whether it were so or not might, under all the circumstances, have been a question for the jury; but it approaches so near to it as to induce us to believe that the case requires further inquiry. Where there has been a material concealment, it is unnecessary to consider whether it was effected by fraud or accident. The certificate of the surgeon, which was forwarded to the office, stated Mrs. E. to be generally in good health; when a year or two previously it was proved that she was not so; but they were not informed that another surgeon had attended her shortly before the policy was executed; and if they had known that fact, they might have made inquiries of him, when they might have altered the terms of the policy.

DUCKETT *v.* WILLIAMS, M. T. 1834. Ex. 2 *C. & M.* 348.

A misrepresentation implies a knowledge.

BY the policy it was stipulated that if the declaration contained any untrue averment or any of the facts were untruly stated, the premiums should be forfeited, and the assurance void. It being found that the life was not at the time insurable, and therefore the facts not truly stated—

The Court held, that those words were not to be restricted as meaning "truly within the knowledge of the party making the statement," but that the knowledge was immaterial, and the premium forfeited.

LINDENAU *v.* DESBOROUGH, M. T. 1828. K. B. 8 *B. & C.* 586; S. C. 3 *C. & P.* 352.

Answering literally the question put is not sufficient if any material fact is concealed, though not falling within the usual inquiries*.

THE Duke of S. G., on insuring his life, answered all the usual questions in the certificate; but after his death it was discovered that there had existed in his head, for many years, a large tumour pressing on the brain, to which the loss of speech and mental faculties might be attributed; but all the medical testimony went to establish that the symptoms during the Duke's life were not such as were likely to excite suspicions that such a tumour existed, or that he was afflicted with any particular disorder tending to shorten life. In an action on the policy of insurance—

Per Cur.—It is said that the party is not bound to do more than

* A policy of insurance on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non-communication by such person of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, if it appears that the disorder was of such a character as to prevent the party from being conscious of what had happened to him while suffering under it. (*Swete* v. *Fairlie*, H. T. 1833, N. P., 6 C. & P. 1). Where a policy contains a proviso, that it is to be deemed void if anything set forth in a written statement, signed by the assured, should be found to be untrue, the insurers are discharged by the assured's misrepresenting a material fact, although such misrepresentation was made verbally, and did not form part of the written statement. (*Wainewright* v. *Bland*, T. T. 1825, N. P., 1 M. & Rob. 481). But where a policy of insurance contains a warranty that the assured "has not been afflicted with, nor is subject to gout, vertigo, fits," &c., such warranty is not broken by the fact of the assured's having had an epileptic fit in consequence of an accident. To vacate such policy, it must be shewn that the constitution of the assured was naturally liable to fits, or by accident or otherwise had become so liable. (*Chattock* v. *Shawe*, T. T. 1825, N. P., 1 M. & Rob. 498).

answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any rational man would think material. It certainly seems to us that the circumstances proved as to the state of the Duke of Saxe-Gotha's mental faculties were material, and the concealment avoided the policy.

MAYNARD *v.* RHODES, M. T. 1824. K. B. 5 *D. & R.* 266; S. C. 1 *C. & P.* 360.

And a party insuring the life of another, is bound by any mistatement as to health made by him.

THE plaintiff effected an insurance on the life of P., who, at the time of his examination at the office, concealed a disorder of which he subsequently died.

The Court held, that the plaintiff was bound by the breach of the conditions on which the policy was effected, although not privy to the falsehood.

(*c*) PARTIES TO ACTIONS CONNECTED WITH.

LEFEVRE *v.* BOYLE, T. T. 1832. K. B. 3 *B. & Ad.* 877.

The trustees who signed the policy may sue to recover back money paid to the defendants under it, the policy being void.

IN an action for money had and received, it appeared that the officers of an insurance company, not incorporated, were regulated by the trusts of a deed, which declared that the money of the company should be lodged at a banker's, in the names of the trustees, who should insure policies and transact various other affairs described in the deed. The trustees issued a life policy under seal. The party who was beneficially entitled received the money by a cheque on the bankers, in the name of the trustees, and gave a receipt, treating the money as received from the trustees. In an action afterwards brought to recover back the money, as money had and received—

The Court held, that the action was well brought in the names of those trustees; and that there was no necessity to join the other members of the company as plaintiffs.

(*d*) PLEAS.

WELD *v.* FOSTER, M. T. 1826. C. P. 12 *Moore*, 61.

A denial of the policy being under seal will not be allowed to be pleaded with a fraudulent misrepresentation of the life insured.

ON a rule to shew cause why the defendant should not plead several matters in this cause, which was founded on a policy of insurance for the life of the plaintiff—viz. first, the general issue; secondly, a representation to the defendant as to the life of the party intended to be insured; and lastly, that the policy was not under seal—

The Court imposed on the defendant the terms of admitting the policy, and confining his plea to the general issue and fraudulent representation only, on the ground that the plaintiff should not be put to strict proof of the policy, as it was frequently signed by several directors, and the subscribing witness might not see the signature and execution by each of them.

(*e*) Evidence*.

Wainwright *v.* Bland, H. T. 1836. Ex. 1 *M. & W.* 32; S. C. 1 *Tyrw. & Gr.* 417.

A false representation to parol questions will vitiate a policy.

In an action on a policy of insurance, it appeared that a party who insured her own life for two years, in answer to certain oral questions, represented falsely her object in effecting the policy for that period, and also that she had not insured at any other office. The jury having found that these were material inquiries—

The Court held, that the policy was avoided.

(*f*) Of the assignment and sale†.

III. RELATIVE TO INSURANCE, MARINE.

(*a*) Who may insure‡.

Robinson *v.* Gleadow, M. T. 1835. C. P. 2 *Scott*, 250; S. C. 2 *Bing. N. S.* 150.

One of several part-owners may insure so as to bind the rest.

One of several part-owners of a ship, without any express authority from the others, effected a joint insurance upon the entire ship, charging the premium and commission in the ship's accounts, which were open to the inspection of, and were actually inspected by, the other owners, and not objected to.

The Court held, that the jury were warranted in finding that the managing owner had a joint authority to effect an insurance for the whole; and that, consequently, all the owners were liable to the broker, notwithstanding that credit was, in the first instance, given to the managing owner alone, it appearing that the broker was ignorant of the names.

* In an action on a policy of insurance on a life, the defendant pleaded that the declaration contained in the policy was untrue in this, that the person was not in good health. Replication, that the declaration in the policy was true, and that the party was in good health:—Held, that, in these pleadings, the plaintiff was entitled to begin. (*Rawlins* v. *Desborough*, M. T. 1837, N. P., 2 M. & Rob. 70; S. C. 8 C. & P. 321).

† A letter to the secretary of the insurance office from a party stating himself to be the holder of the policy, and inquiring what sum would be given for it:—Held sufficient notice of the assignment; in such cases the slightest circumstance of notice is sufficient. (*Slight, ex parte*, 1 M. & Bli. 502).

In an action by the purchaser of a policy effected on the grant of a redeemable annuity, which had been redeemed, but the particulars of sale did not state such interest to be redeemable:—Held, that the sale was not invalidated, it being the practice of the office to pay such policies without inquiry as to the continuance of the interest, and the defendant knew so, having applied to the office to become the purchaser of the policy, there being no direct misrepresentation nor intention so to do, and the practice of the office:—Held to be admissible evidence in such case. (*Barber* v. *Morris*, 1831, N. P., 2 M. & M. 62).

‡ In general all persons may insure. (See 2 Selw. N. P. 913, 5th ed.). But aliens cannot insure. (*Raphael* v. *Nesbit*, 6 T. R. 23).

(*b*) What property and interest may or may not be insured.

Devaux *v.* Steele, T. T. 1840. C. P. 6 *Bing. N. S.* 358; S. C. 8 *Scott*, 637.

The interest must be vested, and not in expectation,

In an action on a policy of insurance, it appeared that the owners of a French ship effected an insurance on the vessel, engaged in the whale fishery, to encourage which a bounty per ton, to the amount at least of half its burden, was allowed by the French government, and which ordonnance was in force at the time of the insurance and loss, but the vessel had not fully complied with the conditions of ordonnance; but it was the custom of the government to make the allowance under such circumstances.

The Court held, that, being a mere expectation, and not a vested interest, it was not an insurable interest.

Stockdale *v.* Dunlop, H. T. 1840. Ex. 6 *M. & W.* 224.

and capable of being enforced.

Messrs. H. & Co., being the owners of two ships called the Antelope and the Maria, trading to the coast of Africa, and which were then expected to arrive at Liverpool with cargoes of palm oil, agreed verbally to sell to the plaintiffs 200 tons of oil, 100 tons to arrive by the Antelope, and 100 by the Maria. The Antelope did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The Maria, having 50 tons of palm oil on board, was lost by peril of the sea. The plaintiffs having insured the oil on board the Maria, together with the expected profits thereon—

The Court held, that they had no insurable interest, as the contract they had entered into with H. & Co. being verbal only, was incapable of being enforced.

Etches *v.* Aldan, M. T. 1827. K. B. 1 *M. & Ry.* 157.

But, at the time of insurance, if there be a clear explanation of the interest to which it is to apply, the party may recover.

A. let his ship on hire to B. for a voyage calculated to continue eight months, at 100*l.* per month, and by the charter-party B. was to advance the sailing charges in part of the sum due for hire. A. effected an insurance with C. on half the full amount of hire, called mistakingly freight, and B. also, at the time, effected an insurance on the sum advanced for sailing charges. On a total loss—

The Court held, that there being a distinct policy to meet the outgoing, and a clear explanation at the time of the insurance of the interest to which it was to apply, A. was entitled to the full amount of the sum insured.

Palmer *v.* Pratt, T. T. 1824. C. P. 2 *Bing.* 185; S. C. 9 *Moore*, 358.

The drawee of bills has not an insurable interest in them*.

In order to secure advances made in this country to K., bills were drawn on a house in India, the agents of P., the indorsee, payable at thirty days after the arrival of the ship, which were to be there

* Ship-owner having entered into a contract for freight, has an insurable interest, though the contracts are not in writing. (*Miller* v. *Warre*, 1824, N. P., 1 C. & P. 237). To enable the plaintiff, in an action on a policy of insurance

negotiated, on the faith of a consignment of goods of double the value to the foreign agents.

The Court held, 1st, that P. had not an insurable interest in such bills, as he could lose nothing by them, and so no risk; and 2ndly, that they were improperly described as bills in the policy, as depending on the contingency of the ship's arriving.

MURPHY *v.* BELL, T. T. 1827. C. P. 4 *Bing.* 567; S. C. 1 *M. & P.* 493.

IN an action on a policy on goods, stipulating that the goods should be valued at five tierces of coffee, valued at —— per tierce, "that policy to be deemed sufficient proof of interest."

A policy in effect amounting to interest or no interest, is illegal.

The Court held the policy void under 19 Geo. 2, c. 37, as dispensing with all proof of interest, and in effect amounting to an insurance, interest or no interest.

SIMONDS *v.* HODGSON, M. T. 1829. C. P. 6 *Bing.* 114; S. C. 3 *M. & P.* 385.

THE interest insured was described in the policy to be on bottomry; but it appeared, from the terms of the bond, that the money was payable within eight days after arrival of the obligor in L.:— Held, that it was a fatal misdescription of the bond, the plaintiff's claim under it not depending on the risk of the voyage, but, according to the terms used, might be made whether the ship arrived or not.

The interest insured must be accurately described.

(*c*) WHO MAY BE INSURERS.

STRONG *v.* HARVEY, M. T. 1825. C. P. 3 *Bing.* 304; S. C. 11 *Moore*, 72.

IN an action on a policy of insurance, it appeared that the plaintiff and defendant were members of an association of ship-owners, who, under the regulations indorsed on the policy on which the

Several ship-owners* associating them-

for a total loss, to recover interest by way of damages:—Held, that it is necessary that he should make a distinct demand of the money at an early period, so as to inform the underwriter that, if the loss is not settled, he will be called upon for interest for the sum due. (*Bain* v. *Cose*, M. T. 1829, N. P., 1 M. & M. 262; S. C. 3 C. & P. 496).

* Where, before 6 Geo. 1, c. 18, (repealing the previous monopoly of insuring marine risks by the Royal Exchange and London Insurance Companies), an agent of a fire and life insurance office in London, by their agent in Scotland, agreed for a general insurance on steam-vessels, without any exception of sea risks, and received the full premiums, and the agent, although apprised that his principals never insured such risks, never communicated that to the assured, nor delivered the actual policy containing such exceptions. Upon a loss by fire at sea, and a suit raised in the courts of Scotland for a policy conformable to the contract, or for payment of the sum insured, and judgment for the latter alternative in favour of the assured, on the ground that loss by fire at sea was not a risk at the time, within 6 Geo. 1, c. 18, the House of Lords, repudiating that ground, affirmed the judgment, upon the ground that the action was founded on an agreement made in Scotland, to which the statute did not extend, and the assured therefore entitled to recover. (*Patteson* v. *Wells*, 1831, Dom. Proc., 1 Dow, 342). A party is not bound to communicate the time of sailing of a ship, unless at the time of effecting the policy the ship is what is called a missing ship. (*Elton* v. *Larkins*, 1832, N. P., 5 C. & P. 385).

selves for the purpose of insuring each other's ships, is not illegal, under the 6 Geo. 1, c. 18.

plaintiff had declared, had entered into a mutual engagement for the insurance of each other's ships. On the question whether this was legal—

Per Cur.—Such an insurance is not against the 6 Geo. 1, c. 18. That statute (to secure to the two great companies the monopolies they had purchased of government) rendered invalid the policies of insurance of other corporations, or of any persons insuring as a society, or in partnership, but permitted parties to insure with individual underwriters as before. The assured, and all the underwriters on this policy, are members of a society for the insurance of ships; but this society has no joint stock; it enters into no joint contract; the individual members are alone answerable for any loss that may happen to property insured, according to the terms of their separate contracts.

(*d*) Of the policy.

1. *When executed by an Agent.*

Palmer *v.* Marshall, M. T. 1831. C. P. 8 *Bing.* 79; S. C. 1 *M. & Scott*, 161.

If executed by an agent, the agency must be distinctly proved*.

The declaration alleged, that the plaintiff had effected the policy by M'Ghie and Page, his agents, and averred a loss, from being run down by another vessel. It was objected, that there was no express proof that M'Ghie and Page were the persons who received the order for and effected the policy.

The Court held, that the agency of the persons effecting the policy on behalf of the owner must be expressly proved.

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2. *Of the Stamp.*

Brocklebank *v.* Sugrue, T. T. 1830. K. B. 1 *B. & Ad.* 81; S. C. 1 *M. & Rob.* 102.

An extension of the risk, indorsed on the policy, does not, under 35 Geo. 3, c. 63, s. 13, render a new stamp requisite.

On a policy dated 30th June, on a voyage from Liverpool to Quebec, and thence back to her port of discharge in the U. K., by an indorsement made on the 26th of August, reciting that the vessel had been unavoidably detained beyond the intended time of sailing, and the voyage was changed from Liverpool to New Brunswick and back &c., and in consideration of one guinea per cent. additional, the insurance company agreed to continue on the risk, until the vessel's arrival in her port of discharge in the U. K.

The Court held, that such alteration was within the 35 Geo. 3, c. 63, s. 13, and that no new stamp was necessary.

* A memorandum indorsed on a ship's policy of insurance, for a change of voyage, was signed by an agent of the insurance company. It was proved that the agent had signed similar memorandums on many other policies, and that his habit was to do so, and advise the company of it; though, when a new policy was required, he always sent the proposals to the company:—Held, that this was sufficient proof of the agent's authority to sign such memorandums, and that the other policies on which such memorandums had been signed need not be produced. (*Brocklebank* v. *Sugrue*, H. T. 1831, N. P., 5 C. & P. 21; S. C. 2 M. & M. 102).

3. *Of the Construction of.*

RICKMAN *v.* CARSTAIRS, M. T. 1833. K. B. 2 *N. & M.* 562; S. C. 5 *B. & Ad.* 652.

The construction will be according to the words on the face of the policy*.

IN an action upon a policy "at and from the coast of A. to a port and ports of discharge in the U. K., beginning the said adventure upon the said goods &c., from the loading thereof aboard the said ship, twenty-four hours after her arrival on the coast."

The Court held, that there being nothing disclosed upon the face of the policy to satisfy the Court that it was intended to attach upon the outward cargo, it would not reject the latter words, which limited it to the homeward cargo only.

MOORE *v.* TAYLOR, E. T. 1834. K. B. 3 *N. & M.* 406; S. C. 1 *Ad. & E.* 25.

Discharge of the cargo means the substantial discharge.

THE policy was from B., in the West Indies, and all or any of the West India islands, to her port of discharge in the U. K., and thence back to B., and all or any of the West India colonies, until she should arrive at her final port of discharge. The ship returned to B., and discharged her cargo, except some coals and bricks, and was proceeding for a fresh cargo; and the jury having found that the substantial cargo was discharged, and the coals and bricks retained merely for the purpose of ballast—

The Court held, that, upon that finding, which they refused to disturb, the adventure terminated upon the arrival, when the cargo was so substantially discharged.

HUNTER *v.* WRIGHT, E. T. 1830. K. B. 10 *B. & C.* 715.

The words "if sold or laid up, for every uncommenced month," in law is laying up for the season.

IN assumpsit, it appeared that by the terms of a policy of insurance, it was provided that there should be a proportionate return of premium "for every uncommenced month, if the ship should be *sold or laid up.*"

The Court were of opinion, that the words "laid up," thus coupled with the word "sold," meant a laying up of the ship for the season, without any intention of employing her again during the year.

* It is for the Court to put a construction on what are "perils of the seas," which are terms of general import. (*Crofts* v. *Marshall*, M. T. 1836, N. P., 7 C. & P. 597). A general dictionary of the English language is not authority to shew, on a trial, the meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage. (*Houghton* v. *Gilbart*, T. T. 1836, N. P., 7 C. & P. 701). A homeward policy, at and from A., on freight, attaches at the period when the ship is in a condition to begin to take in her homeward-bound cargo, which is a question of fact for the jury. (*Williamson* v. *Innes*, 1830, N. P., 2 M. & M. 88). Upon a policy at and from L. to S., and thence to B., in Spain, and at and from thence and two other ports in Spain to a port in G. B., the ship, arriving at B., was directed to proceed to T., in Spain, and discharge her cargo, and afterwards to proceed to a bay round a headland of T., and there receive her homeward cargo; whilst there loading, she was lost:—Held, that the latter bay was a "port" within the meaning of the policy. Judgment affirmed in Dom. Proc. (*Scotland Sea Insurance Company* v. *Gavin*, 1 Dow & C. 129). In an action on a policy on a ship, at and from H. to V., with a warranty that the ship was "in port" on a given antecedent day, it is not sufficient that she was safe in some other port than H. on that day. The meaning of this policy is, that she was safe in the port of H. (*Colby* v. *Hunter*, T. T. 1827, N. P., 1 M. & M. 81).

SAMUEL *v.* ROYAL EX. ASSURANCE COMPANY, E. T. 1828. K. B. 8 *B. & C.* 119.

The words "after the vessel has been moored twenty-four hours in safety," mean her place of ultimate destination.

IN an action on a policy of insurance, it appeared that the ship was insured from Sierra Leone to London, (and which insurance was to endure until she had been moored in good safety twenty-four hours), and that she arrived in the evening of the 18th of February, and the captain having orders to take her into the King's dock, at Deptford, moored her near the dock-gates. On the following morning, he was informed, at the dock, that no order for admittance had been received; but that, if it had, the vessel could not be then admitted on account of the quantity of ice in the river. The order was sent by the navy board on the 21st, but, on account of the ice, the ship could not be moved until the 27th, and then, in warping her towards the dock, a rope broke, she grounded, and was totally lost.

The jury found, that the vessel remained at her moorings from the 18th to the 27th of February on account of the ice, and not for want of an order to enter the dock:—Held, that, upon this finding, the plaintiff was entitled to recover; for that the place where the vessel was moored, not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay.

CROWLEY *v.* COHEN, E. T. 1832. K. B. 3 *B. & Ad.* 478.

So, on insurance of canal boats for twelve months, the policy continues throughout the year.

CANAL carriers effected an insurance on thirty boats named, backwards and forwards, and in any rotation, to continue for twelve months, for 12,000*l.* "on goods," but 3000*l.* only to be recovered on any one boat.

The Court held, first, that it was only necessary to describe the subject-matter insured, and not the particular interest of the party; secondly, that the policy continued throughout the year to protect all goods afloat at any one time not exceeding the given amount, and was not exhausted after the carriage of goods to the amount of the insurance.

GABAY *v.* LLOYD, H. T. 1825. K. B. 3 *B. & C.* 793; S. C. 5 *D. & R.* 641.

Horses in a gale, notwithstanding every care, falling down, kicking, killing, and bruising each other, is a loss within the perils of the sea.

UPON a policy on goods, and, by a memorandum, "horses warranted free of jettison and mortality," it appeared that, during a violent gale, although every care had been taken for their security, the horses, by the labouring of the vessel, broke their slings and the partitions, and, being unable to stand, were thrown down, and by the kicking and bruising several were killed, and others much injured.

The Court held, upon the authority of, and confirming the case of *Lawrence* v. *Aberdein*, (5 B. & Ald. 107), (*Littledale*, J., dubitante), that it was a loss by perils of the sea, and the assured entitled to recover.

(*e*) As to freight.

Devaux *v.* Janson, E. T. 1839. C. P. 5 *Bing. N. S.* 519.

Policy on freight from C. coast to B., and the ship put in for repairs at a port on the coast, seven miles from which the plaintiff got a cargo ready to be loaded, but the ship was lost by accident going out of dock:—Held a loss of freight within the policy.

This was an action on a policy of insurance, dated the 27th of August, 1831, lost or not lost, at and from Calcutta, "or any port or ports, place or places, all or any, and in any succession on the Coromandel coast, to any port or ports, place or places, in Bourbon, upon any kind of goods or merchandize, &c., in the good ship or vessel called 'La France.'" And the policy was declared to be "on 1000*l.* on the freight of the good vessel, valued at 1000*l.*" The assured had purchased a cargo, with the intention of freighting the vessel upon the voyage named in the policy, which was procured before the repairs of the vessel were completed, and deposited in a warehouse seven miles from the dock, where the ship lay, ready to be put on board; and whilst in the act of being taken out of dock according to the mode and usage of the place, the ship was so much injured as to make it necessary to have her broken up.

The Court held, first, that such loss came within the words in the policy, "all other perils, losses, and misfortunes that had or should come, to the hurt, detriment, or damage of the subject-matter of the insurance;" and secondly, that the interest of the assured in the subject-matter had attached, so as to entitle him to compensation for the loss of freight.

Flint *v.* Flemyng, T. T. 1830. K. B. 1 *B. & Ad.* 45.

The insurer of freight, to entitle himself to recover, must shew that, but for the intervention of some of the perils insured against, such freight would have been earned.

In an action on a policy of insurance for freight, it appeared that the ship insured sailed on her outward voyage on the 5th of August, 1827, and arrived in Madras roads on the 30th of November in that year. From that day till the 4th of December the crew were employed in discharging the outward cargo; and, on the 6th of that month, the vessel was lost by the perils of the sea. No part of the homeward cargo was then shipped, but the captain had purchased at Madras, by order and on account of the plaintiff, his owner, twenty-five tons of red-wood; and a commercial house, trading under the firm of Baring & Co., had contracted to ship 122 tons of saltpetre; and Webster, one of the partners in that house, engaged to ship ninety tons of light goods. The saltpetre was afterwards sold to Evans, the master of another vessel, who brought it to England upon his own account, but as to those goods there was not any contract in writing.

The Court held, that, upon a policy for insurance of freight by the shipowner, it is immaterial whether he carries his own goods or those of another: the insurer of freight, to entitle himself to recover, must shew that, but for the intervention of some of the perils insured against, some freight would have been earned by goods being actually shipped on board, or some contract for doing so.

Mordy *v.* Jones, T. T. 1825. K. B. 4 *B. & C.* 394; S. C. 6 *D. & R.* 479.

The underwriters are not

In an action on a policy of insurance, it appeared that, in consequence of injury, a part of the cargo of cotton was wetted, and so

liable for the freight, unless insured as such.

much damaged, that it became necessary to take it out, and it could only be re-shipped, without danger of ignition, after a delay of several weeks, in washing and drying it, that it became a prudent man to leave the goods behind, and proceed on the voyage.

The Court held, that the underwriter was not liable for the freight of such goods thereby lost to the owner.

(*f*) As to the crew.

STUART *v.* POWELL, T. T. 130. K. B. 1 *B. & Ad.* 266.

A reduction of the crew* below three-fourths of British seamen may, under circumstances, be allowed, and the insurers liable.

IN an action on a policy of insurance, it appeared that the ship left England with a competent crew, and part dying abroad, it became necessary, in order to obtain a sufficient number for the voyage home, to take in foreigners, reducing the crew to less than three-fourths of British seamen. There was no Consul at the place where the foreign crew were so taken in, and the ship was lost whilst proceeding to a British port.

The Court held, that upon the construction of s. 19 of the 6 Geo. 4, c. 109, the vessel might have been considered as duly navigated if, upon reaching her port, and satisfactory proof having been given before the collector and comptroller of customs of the matter of excuse, and that upon such circumstances of excuse being satisfactorily proved before the jury at the trial, the assured were entitled to recover against the underwriters.

(*g*) As to lost or not lost.

MEAD *v.* DAVISON, E. T. 1835. K. B. 4 *N. & M.* 701; S. C. 3 *Ad. & E.* 303.

A policy executed after the loss is binding.

THE members of a mutual insurance company, to which plaintiff and defendant belonged, executed a policy by their agent, appointed under a general power of attorney to execute policies according to the rules and regulations of the Society, on a ship "lost or not lost," and the ship, at the time of executing the policy, was lost, which fact was known to all parties.

The Court held the policy valid.

(*h*) As to blockade.

DOYLE *v.* POWELL, T. T. 1832. K. B. 4 *B. & Ad.* 267.

A policy is determined at the

DECLARATION upon a policy from L. to M. and B., if open on her final port of discharge on the river P., "with liberty to wait two

* An insurance is void if effected on a vessel which has not a crew sufficient to meet the ordinary contingencies of its voyage:—Held, therefore, that on a voyage from Mauritius to London, where there was none able to do the duties of the captain, if he was ill, the underwriters were not liable for a loss. (*Clifford* v. *Hunter*, T. T. 1827, N. P., 1 M. & M. 103).

Underwriters are responsible for the misconduct or negligence of the captain and crew, but the owners, as a condition precedent, are bound to provide a crew of competent skill. (*Bishop* v. *Pentland*, T. T. 1827, K. B., 7 B. & C. 219; S. C. 1 M. & Ry. 49; abr., p. 352).

months at M., if needful; to return —— per cent. in case of the voyage ending at M.;" on arrival, M. being blockaded to prevent vessels proceeding to B., the vessel remained at M. above two months, and then proceeded to B., during which she was lost.

The Court held, that the risk was determined at the end of two months, and the underwriters discharged.

expiration of two months when there is a stipulation that, in case of a blockade, the ship should be at liberty only to remain that time.

NAYLOR *v.* TAYLOR, T. T. 1829. K. B. 9 *B. & C.* 718.

A POLICY was effected on a voyage to a distant blockaded port, after notification of the blockade, with liberty, in the event of a blockade or being ordered off, to proceed to any other port, and there wait her discharge; the ship on arrival was captured, but subsequently rescued by the crew; the assured after knowledge of the capture, but before learning the rescue, gave notice of abandonment, and claimed the total loss. The jury found that the captain did not intend to violate the blockade.

Insurance of a ship to a blockaded port, with knowledge, is not illegal; and if the ship be seized, but rescued, it is not a total loss under an abandonment.

The Court held, first, that such voyage was not illegal in its commencement, provided it were a part of the original intention to inquire at some port of the continuance of the blockade, the policy being framed upon a doubt as to that continuing at the time of arrival; secondly, that the abandonment being to be viewed with regard to the ultimate state of things, as appearing before the action brought, the notice given did not entitle the assured to recover for a total loss; a mere loss of the adventure by retardation of the voyage, without loss of the thing proved, does not constitute total loss under a policy of insurance by the aid and effect of an abandonment.

DALGLEISH *v.* HODGSON, E. T. 1831. C. P. 7 *Bing.* 495; S. C. 5 *M. & P.* 407.

THE sentence of condemnation of a foreign prize court, for breach of blockade, was expressed with so much ambiguity as to render it impossible to ascertain the real ground on which it proceeded.

Evidence admissible to shew notice of blockade, independently of a sentence of a foreign prize court.

The Court held, that the Court was at liberty, upon the evidence given at the trial, in an action on the policy, to determine whether such violation of the blockade did take place or not; held also, that a voyage described in the policy as to B., but if advised of a blockade continuing then, to M. V., was not illegal.

See 9 *B. & C.* 718.

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7. As to seaworthiness*.

HOLLINGWORTH *v.* BRODRICK, M. T. 1837. K. B. 7 *Ad. & E.* 40; S. C. 2 *N. & P.* 608.

IN an action on a policy for a voyage during twelve months, and loss alleged by perils of the sea, plea, that after the making of the policy, and during the time of her being so insured, the ship was greatly damaged, &c., and unseaworthy; and that the plaintiff might and could and ought to have repaired and rendered her seaworthy, but that the plaintiff well knowing the premises neglected &c., and

No warranty of seaworthiness is implied, except at the commencement of the voyage.

* A finding, that the ship was seaworthy but prematurely abandoned by the crew, is a finding for the plaintiff, upon an issue on the seaworthiness. (*Franko* v. *Nalusek*, E. T. 1835, Ex., 1 Tyrw. & G. 401).

that the ship continued in such an unseaworthy state until the loss. On demurrer—

The Court held the plea bad, as not expressly shewing that the plaintiff was aware of the unseaworthiness, and that there was time for repairing before the loss happened, or that the loss happened from such neglect; and semble, no warranty of seaworthiness is to be *implied*, except at the commencement of the voyage.

HARRISON *v.* DOUGLAS, T. T. 1835. K. B. 5 *N. & M.* 180; S. C. 3 *Ad. & E.* 396.

A clause, that the cable chain be properly tested, is directory only, and not a condition precedent.

A POLICY of insurance contained clauses that all chain cables should be properly tested; all ships to be subject to survey by the committee or by their surveyor, at such times as the committee shall think proper; and subscribers neglecting to get such repairs done to their ships as shall from time to time be ordered by the committee or their inspector, after notice, to be uninsured until the same shall be done. In an action on such a policy for a total loss—

The Court held, that the clause respecting chain cables is merely directory to the committee, and does not create a condition precedent, imposing on the assured the necessity of proving that the chain cable had been properly tested.

(*j*) AS TO THE TIME OF SAILING, AND OF TIME POLICIES.

MOUNT *v.* LARKINS, E. T. 1831. C. P. 8 *Bing.* 108; S. C. 1 *M. & Scott*, 165.

The vessel may sail within a reasonable time after the insurance*.

THE policy was dated 28th February, 1824, and was on freight from S. in India to Europe, with liberty to sail to, touch and stay &c., to load &c., and it was found that the ship left Europe in September, 1823, on her voyage with an outward cargo, and it was detained by the captain, for his own purposes, so long at various places, that she did not arrive at S. until 30th March, 1825, and sailed on the voyage intended to be insured on the 3rd May following.

The Court held, that the jury having found that the delay before the ship arrived at the port where the policy was first to attach was unreasonable and unjustifiable, the Court must intend that the risk was in fact varied, and the underwriters therefore discharged.

PALMER *v.* FENNING, M. T. 1831. C. P. 9 *Bing.* 460; S. C. 2 *M. & Scott*, 624.

A justifiable delay in sailing must be for the

THE policy was dated the 28th of January, 1831. The vessel, at the date of the policy, was lying in the Float at Bristol, and remained there until the 17th of May, 1831, when she sailed for

* A warranty to sail on or before a particular day, is not complied with by leaving the harbour on that day without having a sufficient crew on board, although the remainder of the crew are engaged and ready to sail. (*Graham* v. *Barras*, 3 N. & M. 125; S. C. 5 B. & Ad. 1011). A warranty to sail on or before a particular day is not fulfiled if the ship does not completely unmoor on that day, though she then has her cargo on board, and is quite ready to sail, and is only prevented doing so by stress of weather. (*Nelson* v. *Salvador*, H. T. 1829, N. P., 1 M. & M. 309).

London, but was run down by a brig off the Stuart Point, and totally lost. purpose of the voyage.

The Court held a justifiable delay in sailing must be for the purpose of the voyage.

COCKRANE *v.* FISHER, E. T. 1834. Ex. 2 *C. & M.* 581; S. C. 4 *Tyrw.* 424; S. C. 1 *C., M. & R.* 809, *on error.*

IN an action on a policy of insurance, the warranty was "not to sail after the 15th of August," and on that day the vessel broke ground in the harbour, and was warped a short distance down the river, until further progress was impossible. On a warranty to sail by a certain day, the question is, whether the attempt was bonâ fide; and if bonâ fide, the warranty is complied with.

The Court held, that the question turned solely on the intention of the captain; if he moved the vessel merely and solely for the purpose of complying with the warranty, it was not a compliance therewith; but if he did it from a mixed motive, partly and bonâ fide with the view of placing the vessel in a more favourable position for prosecuting the voyage, and partly to proceed on the voyage, it was a sufficient compliance.

And afterwards, in error, upon a special verdict, stating that the vessel had cleared out, and was in all respects ready for sea, on the day, and that the crew had done all they could to get the vessel out of dock, and as far down the river as the state of the tide permitted, and to put themselves in a better situation for prosecuting the voyage, although they knew it was impossible to get to sea that day, the Court held that the vessel was to be deemed in the prosecution of her voyage, and the warranty complied with.

LANG *v.* ANDERDON, M. T. 1824. K. B. 3 *B. & C.* 495; S. C. 5 *D. & R.* 393; S. C. 1 *C. & P.* 171.

A POLICY of insurance was made on goods to be put on board ship or ships, warranted to sail from Demerara on or before the 1st of August, 1823. A small ship was loaded with the goods near the town of Demerara. The captain having obtained his clearances, unmoored on the 1st day of August, and sailed about two miles to the mouth of the river; but as the tide was low, the pilot thought it would not be well to attempt to cross a shoal, which, beginning about three miles from the mouth of the river, extended six miles. On the 3rd of August, the ship passed the shoal, and on the 8th she was lost. Large ships are accustomed to take in part of their cargo on the outside of that shoal, and their papers are left at the custom-house until the loading is completed. It is sufficient compliance to sail on the 1st, if the vessel leaves on that day, though she anchors for the night to cross a shoal the next day.

The Court held, that the ship had sailed from Demerara on the 1st of August, and that the warranty had been complied with.

PETTIGREW *v.* PRINGLE, M. T. 1834. K. B. 3 *B. & Ad.* 514.

IN an action on a policy of insurance, it appeared that the policy was to be subject, amongst others, to a regulation, which provided that vessels should not sail from ports in I. after the 1st September, the time of sailing to be deemed the time of clearing, "provided the ship were then ready for sea"— But a ship is not ready for sea within the usual terms of a policy until her full ballast is on board.

The Court held, that the ship's dropping down the river, and crossing a bar, without her full ballast, and with which she could

not cross the bar, but was not in a situation, after crossing, to take in on that day, was not a sailing, until such ballast were completed, she not being ready for sea within the regulation.

PALMER *v.* MARSHALL, E. T. 1831. C. P. 8 *Bing.* 317; S. C. 1 *M. & Scott,* 454.

An insurance from Bristol to London, dated 28th of January, when the ship did not sail until the 17th of May:—Held to amount to such a delay as to exonerate the underwriters.

THE policy was dated the 28th of January, 1831. The ship, at the date of the policy, was lying in the Float at Bristol, and remained there until the 17th of May, 1831, when she sailed for London, but was run down by a brig off the Stuart Point, and totally lost. *Taunton,* J., held, that the delay was no alteration of the risk, because the policy did not attach until the vessel sailed. The plaintiff, therefore, had a verdict. On motion for a new trial—

Per Cur.—There must be a new trial, the policy was *at and from Bristol to London;* and although there are cases in which the risk would not attach until the sailing, as, where a ship is not finished, or is *being* repaired, yet, where she is lying in port, complete and ready for sea, as in this case, the risk attaches from the signing of the policy.

STOCKDALE *v.* DUNLOP, H. T. 1840. Ex. 6 *M. & W.* 224.

With respect to time policies*, a contract which cannot be enforced is not an insurable interest.

IN an action on a time policy of insurance, it appeared that the owners of two vessels trading to Africa, in expectation of their arriving with cargoes of palm oil, agreed verbally to sell the plaintiffs 200 tons, half to arrive by each ship. On the arrival of one the 100 tons were delivered to the plaintiffs, in pursuance of the contract, but the other never arrived, having struck on the coast of Africa, and received such injury that her cargo was unloaded and she condemned, and 50 tons of oil, being all she had on board, were transhipped and arrived in safety—

The Court held, that the contract being only verbal, and incapable of being enforced, the plaintiff had not an insurable interest, at the time, either in the goods or expected profits.

DIXON *v.* SADLER, M. T. 1839. Ex. 5 *M. & W.* 405.

On a time policy, the underwriters are liable for the improper conduct of the crew.

ASSUMPSIT on a policy of insurance on a cargo at and from the 17th of January, 1838, until the 17th of July, 1838, at noon, for a loss by perils of the sea.

The Court held, it is no defence to the underwriter that the loss was occasioned by the unseaworthiness of the vessel, which had been brought about during the voyage, by the negligence or misconduct of the master or crew; and the liability of the underwriter in this respect is the same, whether the policy be one for time, or for a particular voyage.

* It seems that it would be better that a time, depending on the age of the ship, should be specified in the policy, as the time from which the deduction of one-third new for old should take place, instead of its depending on the first voyage. (*Pine* v. *Steele*, T. T. 1837, N. P., 8 C. & P. 200; S. C. 2 M. & Rob. 49).

(*k*) As to the pilot.

Philips *v.* Headlam, E. T. 1831. K. B. 2 *B. & Ad.* 380.

If no pilot comes after a reasonable effort, and the captain endeavours to land, and the ship is lost, the underwriters are liable.

In an action on a policy of insurance, it appeared that the ship was lost while going into port; the captain did not take a pilot on board to conduct her in. Whether he could have obtained one in a reasonable time, and whether he acted judiciously or not, in not waiting until he could obtain one, were questions upon which there was evidence on both sides. The jury having found a verdict for the plaintiff, a rule was obtained to set it aside.

Per Cur.—By the law, the assured are bound to provide a competent ship, master, and crew, and, where there is usage, to have a pilot. That was the principle in *Law* v. *Hollingsworth*. The master, however, is to have a discretion allowed him; and a reasonable effort on his part to obtain a pilot is sufficient.

(*l*) As to concealment.

Flinn *v.* Headlam, T. T. 1829. K. B. 9 *B. & C.* 693; S. C. *by name of* Flinn *v.* Tobin, T. T. 1829. N. P. *M. & M.* 367.

A misrepresentation as to the cargo, if not material, does not avoid the policy;

This was an action on a policy of insurance; and the question argued in the cause was, whether the policy was void by reason of a misrepresentation made by the ship-owner to the underwriter. The latter made some demur, in consequence of understanding that the ship was to carry rock salt. The agent said *she* would carry only so much as would put her in ballast trim. That, in point of fact, was not true, as she carried a very large quantity; but the fact upon which the underwriter placed the greatest reliance, when treating for the insurance, was the obtaining a certificate that the ship was in good repair, and seaworthy. The defence now made to the action was the falsehood as to the rock salt. Lord *Tenterden* left it to the jury whether there had been any material misrepresentation. They were of opinion there had not, and found for the plaintiffs, and—

The Court refused to interfere.

Winter *v.* Haldemand, T. T. 1831. K. B. 2 *B. & Ad.* 649.

but if there be a charter-party, it should be communicated on effecting the insurance.

On a policy of insurance on specie, from the river Plate to Canton and back, and, on the return thereof in merchandize, the assured chartered the vessel from Buenos Ayres to Canton and back, and they were to pay for the voyage a sum in China, necessary for port-charges and incidental expenses, not exceeding 2,000 dollars, and to pay the balance up to 10,000 dollars after the vessel's return to Buenos Ayres. The specie was shipped at Buenos Ayres, and arrived at Canton, where the port-charges and incidental expenses were paid. The ship was lost on her return. The underwriters had no notice of the terms of the charter-party. The policy was an open policy.

The Court held, that the assured were not entitled to recover, as the circumstance of the charter-party should have been communicated at the time of insuring.

WESTBURY *v.* ABERDEIN, M. T. 1836. Ex. 2 *M. & W.* 267.

So, if the insurer states that two ships sailed together, knowing they parted in a gale, and one has arrived, it is a concealment;

IN an action on a policy of insurance, it appeared that the policy was effected on the 3rd November, on the ship G., at and from M. to L., warranted to sail on the 10th October previously, and the insured communicated that the ship G. sailed with another, the F., on the 10th October, which latter had, with the underwriter's knowledge, arrived some days before; but the insured did not communicate the fact that the G. and F. had parted company in a gale on the 21st October.

The Court granted a new trial, although the jury had found that the fact was not a material one.

ELTON *v.* LARKINS, T. T. 1831. C. P. 8 *Bing.* 198; S. C. 1 *M. & Scott*, 323; S. C. 5 *C. & P.* 86.

and a letter received, stating the time a ship sailed from the port, ought to be communicated to the underwriter.

IN an action on a policy of insurance, it appeared that the insurance was effected on the 29th of December, 1828, though the date of the policy was in January, 1829. The plaintiff's son swore that his father, on the 29th December, told the broker that the ship was to sail on the 23rd of November, and asked him if he had done any thing as to the insurance; that the broker said there was no risk in it, that he would take it himself for ten guineas, and that he could get it done at from 25*s.* to 30*s.* It also appeared that previously the assured received a letter, stating the time of sailing from the port from which the ship was insured.

The Court held, that it ought to be communicated, and was not dispensed with by the fact being announced in the foreign lists filed at Lloyd's.

(*m*) AS TO AVERAGE.

DALGLISHE *v.* DAVIDSON, M. T. 1824. K. B. 5 *D. & R.* 6.

Average stated in foreign country evidence here.

IN this case the Court held, that the owner of a British ship may avail himself of a statement of a voyage made in a foreign country so as to charge the shippers of goods as a freighter, under an agreement for charter entered into in this country, together with the expenses of wages and provisions included in such statement, according to the practice of the foreign country where it was made, although not recoverable as average by the laws of this country.

(*n*) AS TO DEVIATION.

HANE *v.* TRANS, T. T. 1827. K. B. 7 *B. & C.* 14.

A deviation does not affect a prior loss, and the underwriters are liable.

IN an action upon a policy for a voyage from A. to B., the captain took in goods for S., an intermediate port, the policy containing no clause giving liberty for the vessel to put into S.

The Court held, that the jury having found under the learned Judge's directions, that the cargo had sustained damage to the amount of three per cent. before the ship came to the deviating point, it was a loss sustained before any deviation, and the underwriters liable; but putting into S. was a deviation, and they would not have been liable for any loss which accrued subsequently.

HUNTER *v.* LEATHLEY, E. T. 1830. K. B. 10 *B. & C.* 858.

UPON a policy "at and from Singapore, Penang, Molucca, and Batavia, all or any, to the ship's port in Great Britain, A. or &c., or all or any, with leave to touch, stay, and trade at all or any port and place whatsoever in the East Indies, Persia, or elsewhere, as well beyond as at and on this side of the Cape of Good Hope, upon goods, &c. on certain vessels, &c., beginning the adventure upon the said goods from the loading thereof aboard the said ships as above." One of the ships having taken in part of her cargo at Batavia, proceeded to Sourabaya (not in the course of the voyage from B. to Europe), took in goods there, and returned to B., from whence she sailed to Europe, in which voyage she was lost.

So, if a vessel goes to a place not named, and returns from it in safety, and is afterwards lost, the insurance is not vacated*.

The Court held, that going to S. was not a deviation, and that the policy covered the goods there taken on board.

LEATHLEY *v.* HUNTER, T. T. 1830. C. P. 7 *Bing.* 517; S. C. 5 *M. & P.* 457; S. C. 2 *C. & J.* 423.

UPON a policy on goods by the ship J. at and from Singapore, Penang, Molucca, and Batavia, all or any, to the ship's port of discharge in Great Britain or East Indies, &c., with leave to touch, stay, and trade at all or any ports and places whatsoever and wheresoever, in the East Indies, Persia, or elsewhere, as well beyond as at and on this side the Cape &c., and in any direction and for any purpose. The ship took goods on board at Batavia, and proceeded to Sourabaya, and there took in goods and returned to Batavia, and thence proceeded homewards.

And it is no deviation, under a policy to touch and trade at all or any of the ports in the East Indies, to call at Sourabaya.

The Court held, that the proceeding to Sourabaya was no deviation, and the assured were entitled to recover for the loss of goods shipped there as well as at Batavia.

See 3 *Taunt.* 419; 5 *M. & S.* 6.

WARRE *v.* MILLAR, T. T. 1825. K. B. 4 *B. & C.* 538; S. C. *D. & R.* 1.

IN an action on a policy on freight of a ship at and from Grenada to London, it was proved that there is only one custom-house for the whole Island of Grenada; that the vessel arrived in safety at Grenada, and discharged part of her outward cargo at three different bays, and she was proceeding to a fourth to discharge the residue of her outward cargo, and take in part of her homeward cargo, when she was lost by perils of the sea.

So, going to a port for a double purpose, as discharging and taking in cargo, when only one is sanctioned by the policy, is not a deviation.

The Court held, that the vessel at the time of her loss was proceeding to this fourth bay for a purpose connected with the voyage insured, and, consequently, that it was no deviation to take in a new cargo; and the underwriters were liable.

BROWN *v.* TAYLEUR, M. T. 1835. K. B. 5 *N. & M.* 472; S. C. 4 *Ad. & E.* 241.

THIS was an action on a policy on the ship Penrith, "at and from her port of lading, in North America," to her port of discharge

But proceeding to a different

* It is not a deviation for a vessel, after completing her outward voyage, to stop at places within the description of the homeward one, to leave part of her outward cargo. (*Miller* v. *Warre*, H. T. 1824, N. P., 1 C. & P. 237).

port within the same bay, though subject to the jurisdiction of the same custom-house, is a deviation.

in England, stating a loss by her crew abondoning her, and by the perils of the sea.

The Court held, that the word *port* must be taken to be the same as place, and not as a port under the custom-house regulations; and that, where the ship began to load her cargo at Cockaigne, which is a member of the port of St. John's as far as custom-house regulations are concerned, and afterwards went to Buckhist to take in the rest of her cargo, which is also a member of the same port, the risk commenced at her first port of lading (Cockaigne), and that the going to a different port was a deviation.

HAMILTON *v.* SHEDDON, T. T. 1837. Ex. 3 *M. & W.* 49.

So, where an insurance allows a ship to act as a tender, it does not mean to render assistance to a ship on a different voyage; and if it does, it is a deviation.

IN an action on a policy from and to any port of trading on the coast of A. and thence back to L., with liberty to call at any ports and places backwards and forwards, without being deemed a deviation; also to tranship on board any ship in the same employ, and that the ship might be used as a tender to any other ship in the same employ. The ship at B., on the coast of Africa, was employed in removing the cargo from another ship, which got on shore, and took it, not to the nearest place of safety, but to another port, and on a different voyage.

The Court held, 1st, that such assistance was not in the employment as a tender, and was a clear deviation, and having been lost on the homeward voyage, the plaintiffs were not entitled to recover; and 2ndly, that it was a question properly left to the jury, whether the stay at B. was for an unreasonable time or not.

BOTTOMLEY *v.* BOVILL, H. T. 1826. K. B. 5 *B. & C.* 210.

And an insurance to sail to and from certain places, and call at other ports, does not sanction the going to another port.

ON a policy at and from G. to S. S., and at from thence to all ports and places in the East Indies or South America, with liberty in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever, and take in and discharge goods &c., at all places in the channel &c., and wheresoever the ship might proceed to on this or the other side of the Capes of Good Hope and Horn, and for all purposes whatsoever, "particularly to trade and sail backwards and forwards, and forwards and backwards." The ship after arriving at S. W. proceeded to Z., a place in the directions from S. W. to South America, and on her return to S. W., with the view of making the voyage from S. W. to the East Indies, was lost.

The Court held, that, being a policy for a particular voyage, the words, of however large and extensive import, were to be construed in the same manner as in other cases of the like nature, and that the ship would be protected by that policy only so long as she was sailing on an intermediate voyage, undertaken with a view to the accomplishment of one or other of the voyages, either to the East Indies or South America; and that at the time of the loss being on a voyage distinct from and not connected with either of the voyages contemplated by the parties or the principal objects of the contract, she was not at that time on the voyage insured.

(*o*) As to the loss.

1. *Total or Partial.*

Allen *v.* Sugrue, M. T. 1828. K. B. 8 *B. & C.* 561.

As to whether a loss be total or partial there is no difference between valued and open policies.

This was an action on a policy of insurance upon the ship Benson. The policy was for twelve months, and was what is called a valued policy, the value of the ship being stated in the policy to be 2000*l.* The ship went aground near the entrance of the old harbour of Hull, and there received considerable damage by straining and the breaking of her timbers. On being examined by surveyors it was found that some of her timbers were decayed, and that the expense of a complete repair would amount to upwards of 1,450*l.*, which in the opinion of the surveyors was more than she would be worth after repairing. Upon this the owner gave notice of abandonment.

The Court held, that, where a ship is insured upon a policy in which her value is stated and agreed upon, and the assured become entitled to recover as for a total loss, they are entitled to recover the full amount mentioned in the policy, although it be proved that in point of fact she was not worth so much, and that there was no difference between a valued and an open policy.

Holdsworth *v.* Wise, H. T. 1828. K. B. 7 *B. & C.* 794; S. C. 1 *M. & Ry.* 673.

Where the crew have to abandon the ship, and notice of abandonment is given, the ship being ultimately recovered, does not save the liabilities of the underwriters for a total loss.

In an action on a policy of insurance it was found that the ship sailed, on the 10th September, 1826, from St. Andrew in New Brunswick, laden with timber, and bound for Valentia in Ireland; that they had fine weather until the 20th, when a gale sprung up in the evening which continued until the 23rd. There was then a heavy sea, and the ship laboured heavily. On the 22nd in the morning she was on her beam ends. They kept both the pumps going, and threw the timber off the decks. The sea struck the jolly boat: she remained on her beam ends all the time. At five in the afternoon they got her up before the wind. She answered the wind badly; cut the top-gallant masts: she was sinking in the waters. The pump was choked on the 23rd. They then agreed to leave the ship, their lives being in immediate danger. They got out the long boat, and hailed a foreign ship called the Columbia, which was in sight. That ship took them on board, and carried them to Boston in America.

The Court held, that where a ship is left by the crew under a fair and reasonable apprehension of her sinking, the right of the assured to recover for a total loss will not be affected by the circumstance of her afterwards being taken in charge and brought into port by the crew of another vessel.

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2. *Average Loss.*

Hill *v.* London Assurance Company, M. T. 1839. Ex. 5 *M. & W.* 569.

Under the words, "free from average loss, except &c." On an

In an action on a policy of insurance. A policy of insurance contained the usual memorandum: "Free of all average on corn, flour, fish, &c., except general, or the ship be stranded." The ship, laden with wheat in the bulk, having encountered tempestuous

insurance of wheat, a considerable part being lost in pumping out water:—Held, to be an average loss, and the underwriters not liable.

weather, leaked considerably, and the sea water having found its way into the wheat, a large quantity of wheat was pumped out mixed with water, and lost.

Per Cur.—In this case, the question was, whether the loss of a part of a cargo in bulk was to be considered a total loss of that part, or an average loss. We are of opinion, that this was a case of a particular average within the meaning of the memorandum; and therefore that the assured could not recover against the underwriters the value of the wheat so pumped out.

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3. *By Perils of the Sea*.*

4. *By Stranding.*

HOFFMAN *v.* MARSHALL, T. T. 1835. C. P. 2 *Bing. N. S.* 383; S. C. 2 *Scott*, 539.

Goods lost by stranding after they were put in a lighter in the course of trading, not within a clause "including risk of craft to and from the ship†."

IN an action on a policy of insurance, it appeared that the policy was on goods, "including risk of craft to and from the ship," with a clause, that the goods should be valued at —— "free of particular average, unless the ship should be stranded," and the plaintiffs claimed a particular average loss, by damage to the goods, in consequence of the lighter having been stranded whilst in the course of landing after arrival.

The Court held, that such loss was not covered by the policy.

BISHOP *v.* PENTLAND, T. T. 1827. K. B. 7 *B. & C.* 219; S. C. 1 *M. & Ry.* 49.

A stranding means the ship taking ground by an unforeseen accident;

IN an action on a policy of insurance, it appeared the ship being compelled, by stress of weather, to enter a tide harbour, where she took ground, and, on the fall of the tide, she fell over, from the insufficiency of a rope used in fastening her to the quay, whereby the cargo was injured.

The Court held, that even assuming the negligence of the crew to have occasioned the injury, it was to be deemed a stranding, and a loss by peril within the meaning of the policy. A stranding is where a ship takes the ground, not in the ordinary course of the navigation, but by reason of some unforeseen accident.

* A vessel, warranted free from capture, when near shore waiting for a pilot drifted and was lost, and afterwards seized and confiscated by an enemy:—Held, lost by perils of the sea. (*Hahn* v. *Corbett*, T. T. 1824, C. P., 2 Bing. 205).

† Where the ship, in consequence of a leak, struck on a sand-bank, in a tide river, and at high water was entirely covered, soon after which she was sold, and notice of abandonment given; the purchaser shortly afterwards, in consequence of the effect of a change of wind, was enabled to raise her, and she was at a great expense repaired, and in a state to have returned, although not for the purposes of the original voyage:—Held, that, although the ship insured remained in specie, the circumstances were such as might be equivalent to a total loss, if, at the time of sale, that measure, as the sound exercise of the best judgment, appeared to be most beneficial to all parties, the loss of the voyage would not affect the liability of the underwriters, who indemnify only against the loss of the ship. (*Doyle* v. *Dallas*, 1830, N. P., 2 M. & M. 48).

KINGSFORD *v.* MARSHAL, M. T. 1831. C. P. 8 *Bing.* 458; S. C. 1 *M. & Scott*, 657.

IN an action on a policy of insurance, it appeared that the ship in the port took ground in the usual course of the ebbing of the tide, but, in consequence of settling on a hard substance, holes were made, and the cargo damaged.

Or where the taking of the ground does not happen solely from causes incident to navigation.

The Court held, that the jury properly found it to be a stranding within the exemption in the policy; in effect declaring, that the ship had taken the ground, not merely through the ebbing of the tide, and in the place where it was intended she should do so: "stranding" is where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause.

WELLS *v.* HOPWOOD, M. T. 1831. K. B. 3 *B. & Ad.* 20.

IN an action on a policy of insurance, it appeared that the vessel arrived in a tide harbour, and was moored at high water alongside the quay, and in order to avoid grounding on a bank at low water, the stern being fastened to the quay, the head was hauled off by a rope carried to the opposite side of the harbour, and fastened, but by the wind blowing towards the bank causing a strain on the rope, her place was changed, and she came to the ground, and received some damage.

And where a rope was fastened to keep a vessel moored afloat, but the wind, &c. strained the rope, and the ship was damaged:—Held, a stranding.

Held (per *Tenterden*, L. C. J., and *Littledale* and *Taunton*, JJ., contrà, *Parke*, J.), to be a stranding.

BARROW *v.* BELL, M. T. 1825. K. B. 4 *B. & C.* 736; S. C. 6 *D. & R.* 244.

IN an action on a policy of insurance, it appeared that the ship was driven into a crowded harbour by stress of weather, struck upon a sunken anchor, and becoming leaky, to prevent her sinking, was obliged to be hauled from her moorings higher up, where she grounded.

So, a ship driven into port by stress of weather, and striking a sunken anchor, is a stranding within the policy.

The Court held, that it was a stranding within the policy, warranting free from average, unless general, or the ship should be stranded; the ship being laid on the strand, not in the ordinary course of navigation, but ex necessitate, to avoid an impending danger.

ROUX *v.* SALVADOR, T. T. 1834. C. P. 1 *Bing. N. S.* 526; S. C. 1 *Scott*, 491.

IN an action upon a policy from A. to B., free of particular average, unless the ship were stranded. Upon arrival at R., in the way to B., the cargo of hides, being found in a state of incipient putridity from a leak, was sold at B., and, after the leak was repaired, the ship proceeded with the remaining cargo to B., in the course of which she was stranded, but the remaining portion of the cargo was delivered undamaged at B.

A subsequent stranding does not alter the liability of the underwriter on the first.

The Court held, that the subsequent stranding could not affect the nature of the previous loss upon the hides, the rights of the parties being fixed and determined at the time of the sale at R.

5. *By Capture*.*

6. *Of a Sale in case of.*

GARDNER *v.* SALVADOR, T. T. 1831. N. P. 1 *M. & Rob.* 116; S. C. 2 *M. & M.* 116.

If the captain injudiciously sells a ship as a wreck, the underwriters are not liable.

THE vessel having struck on a rock during bad weather, it became necessary for the safety of the crew to leave her, and she was by all persons deemed a perfect wreck, and that it was the best course to sell her as she lay, which the captain did. She was, however, afterwards got off and repaired at a considerable expense.

The Court held, that it was for the jury to say whether by the use of means reasonably within the captain's power the ship could have retained the character of a ship or not: if not, it was a total loss; if otherwise the underwriters were entitled to have them employed for their benefit; and that, if the captain sold erroneously what he might bonâ fide have deemed a wreck, the underwriters were not liable.

7. *Effect of.*

DE VAUX *v.* SALVADOR, T. T. 1836. K. B. 6 *N. & M.* 713; S. C. 4 *Ad. & E.* 147.

Where a vessel is damaged by a collision, and in consequence detained, the underwriters are not liable for the additional sum paid for wages and maintenance of the crew.

IN an action on a policy for time, with the usual warranty as to average, the ship having been injured by collision with another, and each being damaged, the question was referred to arbitration, under which it was awarded that each ship should bear half the joint expenses of the two, and in the result the ship insured had to pay a balance; the ship was also detained during the repairs of damages sustained by perils of the sea, and expended additional sums for wages and maintenance of the crew.

The Court held, that neither these heads of damages could be taken into account by the jury as losses for which the underwriters were liable.

8. *Mode of estimating†.*

* In an action on a policy of insurance on goods and loss by capture, to which the defence was a breach of blockade, it appeared that the ports in the river Plate, belonging to the government of Buenos Ayres, had been declared in a state of blockade by the Brazil government, the ship being destined to any of the ports in that river, with liberty in the event of blockade to proceed to any other port in South America, and the blockading fleet at the time of capture being stationed off Monte Video, a port belonging to the Brazilian government:—Held, that as there is no precise limit of distance to which the blockading fleet may be fixed, it might be lawfully stationed at Monte Video, though at a considerable distance from the ports declared in blockade; and that, as the ship left England knowing of the blockade, it was a question for the jury to say whether the ship ought not, in coming in sight of the blockading squadron, to have inquired whether it were such or not, and not have pursued her voyage without gaining that information. (*Naylor* v. *Taylor*, T. T. 1328, N. P., 1 M. & M. 205).

† Where on the voyage insured the ship had suffered partial injury, and been repaired:—Held, that the rule in practice to ascertain the rate of indemnity, viz. by deducting one-third of the repair, was that on which a jury ought to act, unless there appeared any circumstances to take the case out of that rule. (*Poingdestre* v. *Royal Exchange Assurance Company*, 1 Ry. & M. 378). The great object of a policy of insurance on a ship is to indemnify the assured, and the supposed rule of deducting one-third new for old after the first voyage has grown up to prevent controversy. The question, whether a ship is on her first voyage, is not determined by the policy. (*Pirie* v. *Steele*, T. T. 1837, N. P., 2 M. & Rob. 49; S. C. 8 C. & P. 200).

(*p*) As to adjustment*.

(*q*) As to abandonment.

Roux *v.* Salvador, T. T. 1834. C. P. 1 *Bing. N. S.* 526; S. C. 1 *Scott*, 491.

To constitute a claim for a total loss, notice of abandonment must be given.

In an action upon a policy from A. to B., free of particular average, unless the ship were stranded, upon arrival at R. in the way to B., the cargo of hides, being found in a state of incipient putridity from a leak, was sold at R.; and after the leak was repaired, the ship proceeded with the remaining cargo to B., in the course of which she was stranded, but the remaining portion of the cargo was delivered undamaged.

The Court were of opinion, that the loss upon the hides was total, inasmuch as they never could have arrived at B. as hides, as they would upon the evidence have been either annihilated from putrefaction, or been for the safety and health of the crew thrown overboard; and lastly, that there having been part saved the assured could only claim for a total loss, upon first relinquishing to the underwriter all his interest in what remains; and that, for want of notice of such abandonment, they were not entitled to recover for a total loss.

Mount *v.* Harrison, M. T. 1827. C. P. 4 *Bing.* 388; S. C. 1 *M. & P.* 14.

But no abandonment is essential on an insurance for freight.

A vessel, loading at the Cape, parted from her cables in a gale and was driven on the sand, which afterwards drifted round her, and she was found on survey so much injured that it was deemed prudent to sell her, which was accordingly done; but the cargo was taken out when the vessel was first damaged. In an action against an underwriter on a policy of assurance on the freight—

The Court held, that an abandonment was not necessary, although the ship was afterwards repaired by the purchaser, and had since made several voyages.

(*r*) As to the premium†.

Dixon *v.* Hovill, E. T. 1828. C. P. 4 *Bing.* 665; S. C. 1 *M. & P.* 656.

The plaintiff undertook to effect an insurance on behalf of the defendant with such

The plaintiffs undertook to insure goods for the defendants "with such names as should be to their satisfaction." In an action for the premiums paid—

Per Cur.—It has been contended that, by the terms of their agreement, the plaintiffs were bound to submit to the defendants the

* Where the broker who effected the policy, and whilst the policy was in his hands, entered into an adjustment, which the defendant, the underwriter, signed, and his name was erased:—Held, that the plaintiffs having in no way recognised or adopted such adjustment, nor any custom being established to bind them, were entitled to recover the amount of the loss from the underwriters. (*Benson* v. *Maitland*, 1 Gow, 205).

† Where the assured upon a voyage clearly illegal had paid, and never gave any notice of an intention to rescind the contract:—Held, that he could not recover back the amount so paid. (*Palyart* v. *Leckee*, 6 M. & Selw. 290).

names as should be to his satisfaction:—Held, that the plaintiff might recover the premiums without having submitted the names to the defendant.

names of the subscribing parties to the policies in question for their approval, before they could be in a situation to maintain an action against them for the premiums paid on their account. We are, however, of opinion, that the agreement will not admit of such a construction. The very obvious meaning of it is, that the underwriters should be such as were competent to indemnify the assured from loss.

JENKINS *v.* POWER, E. T. 1817. K. B. 6 *M. & Selw.* 282.

But the premiums upon policies on an illegal adventure cannot be recovered.

IN an action by the underwriter against a broker, to recover premiums on certain policies upon an illegal adventure, really intended by the assured, the words of the policy being large enough to cover such adventure—

The Court held, that, although the subscription might have been innocently made by the underwriter, yet his demand being founded on an illegal consideration, he could not sustain it; and the broker, by the usage of the trade, being accepted as the debtor, and substituted in the place of the assured, had in the action the same grounds of defence as the assured would have had if he had himself effected the policy, except in cases where the assured might have recovered back the premiums from the underwriter.

(*s*) AS TO INSURANCE BROKERS.

BARTLETT *v.* PENTLAND, E. T. 1830. K. B. 10 *B. & C.* 760.—S. P. SCOTT *v.* IRVING, M. T. 1830. K. B. 1 *B. & Ad.* 605.

Where a broker is only authorized to receive payment in money, the underwriter is not discharged by settling the amount of loss with him in account.

IN an action on a policy of insurance, it appeared that the defendants, an Irish company, transacting business in London by an agent, adjusted a loss with the broker of the assured (living at Plymouth) by setting off in account against it a debt due from the broker for premiums, and their names were then struck off the policy; the broker never paid the amount over to the assured, and subsequently became bankrupt.

The Court held, that the plaintiff having only authorized the broker to receive payment in money, and not being shewn to be cognizant of any usuage at Lloyd's as to the mode of adjusting losses, nor to have known or assented to the mode pursued by the broker in the particular transaction, the underwriters were not discharged.

POWER *v.* BUTCHER, M. T. 1829. K. B. 10 *B. & C.* 329.

A broker who has covenanted to pay premiums, cannot recover the amount against his principal as for money paid.

A BROKER had, by deed, effected insurances with a company of which he was a member, for the defendants, and covenanted to pay the premiums, but which, in fact, he had not done; in an action brought by his assignees for premiums and for brokerage—

The Court held, that although the count for money paid could not be supported, yet that they were entitled to recover for the latter, under the count for work &c., as a broker, although the claim was stated in the particulars as for "assurance claim," which might include every possible claim a broker might have, in respect of effecting policies; they were also entitled to recover the premiums, on the

count for premiums, in respect of the bankrupt's "having before then underwritten, subscribed, and *caused* and *procured* to be underwritten and subscribed," upon the latter part of the count, not being bound to prove the entire count.

CALLANDER *v.* OELRICHS, M. T. 1838. C. P. 5 *Bing. N. S.* 58; S. C. 6 *Scott*, 761.

There is an implied promise that a broker shall give notice to his principal of his inability to effect an insurance.

DECLARATION in assumpsit against the defendants for a breach of duty, in neglecting to effect an insurance with a particular clause, alleged that the defendants undertook to give the plaintiff notice within a reasonable time, if any difficulty occurred in effecting such insurance—

The Court held the declaration satisfied by proof of the original agreement to insure, inasmuch as the undertaking to give notice of the difficulty in a reasonable time is supplied by law, and to be inferred from the agreement to insure.

CHAPMAN *v.* WALTON, T. T. 1833. C. P. 10 *Bing.* 57; S. C. 3 *M. & Scott*, 389.

In an action against a broker, general evidence is admissible to shew what he ought to have done according to the instructions he had received from his principal.

THE defendant, a policy broker, having effected certain insurances to certain ports, upon a vessel of the bankrupt, and the vessel having proceeded upon her voyage as insured, the supercargo addressed a letter to his owner, advising an alteration in the policies, for the purpose of obtaining a better market. The bankrupt delivered such letter to the defendant, at the same time desiring him *to do* the *needful*. In an action against the defendant for a breach of duty, in not taking such steps as would enable the assignees to recover against the underwriters upon a loss—

The Court held, that the opinion of other policy brokers, to whom the policies, invoices, and letter were submitted, was admissible as evidence of what the conduct of a careful broker ought to have been under the circumstances in which the defendant was placed, and under the instructions by which he was bound to regulate his conduct.

(*t*) AS TO REPAIRS.

SARGUY *v.* HOBSON, M. T. 1826. C. P. 4 *Bing.* 131; S. C. 12 *Moore*, 474; S. C. 2 *B. & C.* 7; S. C. 3 *D. & R.* 192; 1 *Y. & J.* 347.

Underwriters are not liable for goods sold to repair the ship*.

PART of the goods were sold to defray the expenses of repairing injuries sustained by the ship in a tempest.

The Court held, that the perils of the sea not being the proximate cause of the sale of the goods, the insurers were not liable, as the doctrine of abandonment could not be extended to such a cause.

See 5 *M. & S.* 431.

* Where it appeared that the vessel was in a place where the repairs could have been done, and money obtained, although at an extravagant rate, and the captain sold the ship; upon a question of liability, as for a total loss, or not:—Held, that it was properly left to the jury to say, whether the expenditure was so great, that no prudent man, in the exercise of a sound judgment, would hesitate as to the propriety of selling; if not, that then the captain was not compellable to incur it, and the sale by him was not under a justifiable necessity. (*Somes* v. *Sugrue*, H. T. 1830, N. P., 4 C. & P. 276).

(*u*) As to barratry.*

(*v*) Remedies for breach of the policy.

1. *Parties to Actions.*

Sparkes *v.* Marshall, E. T. 1836. C. P. 2 *Bing. N. S.* 761; S. C. 3 *Scott*, 172.

A change in the interest on the policy by assignment will not preclude the original insured from suing.

A third party entered into a contract with J. & Son, at Youghal, in Ireland, for a certain quantity of oats, to be delivered at Southampton by the packet. He then apprised the plaintiff of the contract, and sold him the oats, to be delivered at Portsmouth, concealing from him the fact, that the destination of the packet was Southampton, and that she would not go to Portsmouth. The plaintiff effected an insurance accordingly. The oats being shipped at Youghal for the third party, he informed the plaintiff of the circumstance, and also that the vessel would not go to Portsmouth; and upon the plaintiff's insisting upon the delivery there, according to his contract, the third party sold the oats to another person, to whom he assigned the invoice and bill of lading upon a total loss.

The Court held, that the plaintiff had such an insurable interest in the oats put on board at Youghal as enabled him to recover from the underwriter.

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2. *Declaration*†.

Strong *v.* Rule, M. T. 1825. C. P. 3 *Bing.* 315.

If regulations be indorsed on the policy, the declaration on the policy ought to set out the regulations as well as the policy.

By regulations indorsed on the back of a policy of insurance, it was provided, that the rules of a certain association should be considered as binding as if inserted in and made a component part of the policy. The declaration only set out the body of the policy, and not the conditions or regulations indorsed on the back. It was submitted for the defendant, that there was a fatal variance, as the evidence applied mainly to those regulations, and, consequently, that the plaintiff could not be entitled to recover. Leave having been given the defendant to move that this verdict might be set aside, and a nonsuit entered on the above objection—

The Court held, that such regulations ought to be set out in the declaration on the policy to shew the nature of the consideration for the assurance, and the mode of payment of the premium.

* The insurer of a ship is not liable for the expenses incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself be not detained by the process. And the circumstances causing the detainer must be positively shewn to have originated in the fraud of the master, in order to support an averment of loss by his barratry. (*Bradford* v. *Levy*, M. T. 1825, N. P., 1 Ry. & M. 331; S. C. 2 C. & P. 137).

† The intention of the new rules of pleading was, and the rule has been, that proof of unseaworthiness lies on the party pleading it:—Held, also, that the proof of deviation lies on the insurer, and that a policy "on goods valued at ——" was a valued policy. (*Franco* v. *Valusch*, T. T. 1835, Ex., 1 Tyrw. & G. 401).

3. *Pleas* *.

COLE *v.* LE SOUEF, E. T. 1836. C. P. 5 *D. P. C.* 41; S. C. 3 *Scott*, 188.

To an action for money paid, it seems that the defendant may plead that the policy was so framed as to be useless.

IN an action of assumpsit for money paid to the use of the defendants, they pleaded specially circumstances shewing that the policy of insurance in respect of which the payments were made had been so framed as to be utterly unavailing. Upon special demurrer, on the ground, amongst others, that the plea was argumentative, and amounted to the general issue—

The Court inclined to think the plea good, but allowed the plaintiff to withdraw his demurrer and reply de novo, without costs.

WILKINSON *v.* LINDO, T. T. 1840. Ex. 7 *M. & W.* 81.

A release by one of several plaintiffs in an action on a policy of insurance is a bar to the action.

IN assumpsit by A. and B. upon a policy of insurance made by them, as well in their own name as for and in the name of others to whom the goods shipped did appertain, averring, that the said A. and one L. were then, and continually until &c. were, interested in the said goods; plea, release by B. for himself and partner A.; replication setting out the release on oyer, whereby it appeared that it was a composition deed and release of the respective debts of the parties executing it.

On demurrer the Court held, that the replication was bad; whatever constitutes an answer to the demand for which the action is brought as against the plaintiff on the record is a bar to the action, although brought for the benefit of others, who could only enforce their claim by suing in the plaintiff's name; but leave given to amend to traverse the release.

STEWART *v.* ABERDEIN, T. T. 1837. 4 *M. & W.* 211.

The defendant may plead a settlement and adjustment according to the usage and custom of merchants.

THIS was an action on a policy of insurance on a ship, effected by D. & Co., brokers in London, as the agents for the plaintiffs, who were merchants in Liverpool. The defendant pleaded that after the loss had occurred, D. & Co., by and with the authority and assent of the plaintiffs, settled and adjusted with the defendant the amount of the loss, according to the usage and custom of merchants in that behalf, at 97*l.* per cent., of which the plaintiffs had notice, and assented to and acquiesced in the said adjustment; that D. & Co., at the time of the payment and satisfaction of the loss as after mentioned, were indebted to the defendant in an amount exceeding the said sum of 97*l.*; and therefore the defendant, by and with the privity, knowledge, and consent of the plaintiffs, paid and satisfied the said sum of 97*l.*, by giving credit to D. & Co. for that amount in their account with him; and the defendant then wholly discharged D. & Co. from all claims in respect of that sum in his said account with them, which payment and satisfaction D. & Co. had full authority from the plaintiffs to accept from the defendant on their behalf, as and for payment and satisfaction by the defendant; and

* A plea, alleging unseaworthiness, and neglect to repair, without shewing knowledge, and an opportunity to repair, is no defence to an action on a time policy. (*Hollingworth* v. *Brodrick*, M. T. 1837, K. B., 2 Nev. & P. 608; 7 Ad. & E. 43).

the said plaintiffs then accepted such settlement and payment in full satisfaction and discharge of the cause of action, as to the said sum of 97*l.* It appeared in evidence that the plaintiffs had for several years effected insurances in London through D. & Co., and had had general and insurance accounts current with them. The policy in question was effected in September, 1835; the loss appeared on Lloyd's books in May, 1836; D. & Co. were indebted to the defendant to the amount of 217*l.* on the underwriting account of the previous year. In June, 1836, they agreed to this account with the defendant, and paid him 100*l.*, leaving the remainder on the account to meet the loss in question. In September it was adjusted by the defendant, and all the other underwriters, except at 97*l.* per cent. A memorandum was written on the policy, stating the loss to be payable in one month, and the defendant's subscription was struck through; and the loss was then passed into the accounts between D. & Co. and the defendant. In November, the loss being then about to be adjusted by the other two underwriters, D. & Co. advised the plaintiffs thereof, and the plaintiffs drew bills on them for the amount of the loss. On the 19th of November D. & Co. inclosed them a credit note of the settlement of the whole loss, and carried the amount of it to the credit of their insurance account with the plaintiffs, of which they sent them an extract; and they debited the plaintiffs with premiums to the end of September, leaving a balance due to the plaintiffs, which they transferred to the credit of the general account. At the foot of the credit-note was written, "Above is the credit-note of the loss per Vrow Elizabeth, 1,155*l.* 3*s.* 10*d.*, but without our prejudice, until in cash from the underwriters." The usage at Lloyd's was proved, by several insurance-brokers, to be to settle losses, as between the broker and the underwriter, in the manner above stated; and some of them stated that the usage was well known in Liverpool.

The Court held, that there was sufficient evidence of a custom, between the brokers and the underwriters, to make settlements in accounts by taking credits as payments, and of such a settlement having been made in the present case; and also, of the plaintiffs having authorized the brokers to make such settlement as in substance to prove the plea, and to discharge the underwriters.

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4. *Bringing Money into Court.*

HARRISON *v.* DOUGLAS, T. T. 1835. K. B. 5 *N. & M.* 180; S. C. 3 *Ad. & E.* 396.

The payment of money into court on a policy precludes the defendant from objecting that the action is prematurely brought;

THE plaintiff, defendant, and others, were mutual insurers, and insured their respective ships for the period of one year.

The Court held, that by payment into Court, although by the terms of the policy the loss would be payable only on a future day, and the action might be premature, the defendant was not entitled to a nonsuit, such payment being an admission to recover to some extent.

OHRLY *v.* DUNBAR, M. T. 1836. K. B. 1 *N. & P.* 244.

but where several actions had

SIXTY actions on a policy of insurance were depending, in which there had been a consolidation rule, binding both the plaintiff and

the defendant by the result of the trial in one cause, and the whole amount was for 27,200*l.*; and the plaintiff having obtained a verdict in that cause, a rule nisi had been obtained for setting it aside, as against evidence.

The Court refused to order the sums to be paid into Court, or invested in Exchequer bills, to await the result of the discussion of the rule for a new trial.

been consolidated, and a rule for a new trial obtained, the Court refused to order the defendant to bring the money into Court.

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5. *Consolidation of Actions.* See Rule, H. T., 2 Will. 4, ante, tit. *Limitations of Action.*

HOLLINGWORTH *v.* BRODRICK, H. T. 1836. K. B. 6 *N. & M.* 240; S. C. 4 *Ad. & E.* 646.

TWO actions were commenced on a policy of insurance; and on the day appearances were entered in each action, and, previously to the delivery of any declaration, the defendants took out a summons to consolidate the two actions. On the 24th of December the matter was discussed before *Coleridge*, J., who said that he had consulted *Patteson*, J., and it was their wish that the question should be discussed before the full Court, in order that the practice might be settled.

Actions may be consolidated before declaration;

Per Cur.—We are of opinion that the rule ought to be entered into upon terms to be agreed upon between the parties; and, in case of disagreement, to be settled by the Court.

DOYLE *v.* STEWART, E. T. 1835. K. B. 4 *N. & M.* 873.

NINE other actions having been commenced by the plaintiff against the several underwriters of a policy of assurance on the ship "Triton," a consolidation rule had been obtained by the defendants upon the usual terms, that the proceedings in ten of the actions should be stayed, the defendants in those actions undertaking to be bound by the verdict.

but where the proceedings are not vexatious, the Court has no power to compel a party to consolidate*.

Per Cur.—Where the proceedings are not vexatious, the Court has no power of compelling a plaintiff to consent to a consolidation rule. The rule is not binding on both parties, but on the one only who seeks the benefit.

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6. *Evidence*†.

BEAUMONT *v.* MOUNTAIN, H. T. 1834. C. P. 4 *M. & Scott*, 177; S. C. 10 *Bing.* 404.

A PRIVATE act of Parliament, contained a clause which enacts, "That the act shall be deemed and taken to be a public act, and

If the act of incorporation

* And if the same plaintiff sues different defendants, the Court will not consolidate without consent. (*M'Gregor* v. *Horsfall*, H. T. 1838, Ex., 6 D. P. C. 338; S. C., 3 M. & W. 321).

† The production by the assured of a policy of insurance, with an adjustment on it, and the name of the defendant struck off, the policy itself does not prove the payment of the sum so adjusted. (*Adams* v. *Sanders*, T. T. 1829, N. P., 1 M. & M. 373; S. C. 4 C. & P. 25). So, in an action on a policy of insurance, where a loss is to be inferred from the want of intelligence, the plaintiff must distinctly prove that, when the vessel left the port of outfit, she was bound upon the voyage insured. (*Kosler* v. *Innes*, M. T. 1825, N. P., 1 Ry. & M. 333).

provides it shall be judicially taken notice of, it is sufficient to produce a copy from the King's printer.

shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded." The question arose upon the mode in which this act was proved. The counsel for the plaintiff produced a copy of the act, purchased a few years since from the King's printer.

Per Cur.—Here the legislature have decided that this act should be judicially noticed, and that it should not be specially pleaded. The question at issue here, namely, whether a director can sue in the name and on the behalf of the company, is one of law, not one of fact for the consideration of the jury; and if we do not notice the statute, we act in disobedience to the legislature, and we do directly the reverse of that which is required of us. We are bound to take judicial notice of the statute. The copy is sufficient evidence.

RICKARDS *v.* MURDOCK, H. T. 1830. K. B. 10 *B. & C.* 527.

Evidence is admissible to shew the materiality of a matter not communicated to the underwriters;

IN an action on a policy of insurance, it appeared that directions had been given to insure a ship, in case she did not arrive within thirty days after the receipt of one letter; and accordingly, after the expiration of the time, a policy was effected, no communication being made of this direction, or when the letter had arrived, and a day before the effecting of the policy a ship had arrived, by which the underwriters might suppose the directions to insure had come. Lord *Tenterden* admitted the evidence of a director of the Royal Exchange Assurance upon the question, whether, in his judgment, the fact of the date of the arrival of the letter was material to be communicated. He said it was. The jury found a verdict in favour of the underwriters.

The Court held the evidence to be properly received; but observed, that, if the question were purely one of law, they were of opinion that the fact was material, and that the not communicating it avoided the policy.

CAMPBELL *v.* RICKARDS, M. T. 1833. K. B. 2 *N. & M.* 542, *semb. overruling* RICKARDS *v.* MURDOCK, H. T. 1830. K. B. 10 *B. & C.* 527.

but that case has been questioned; however, if the opinion of underwriters upon concealed facts be improperly admitted, the jury must decide on the materiality of those facts.

UPON a question as to the materiality of a fact not communicated by the assured to the assurer, the plaintiff offered evidence, by underwriters, to shew that, if the facts had been communicated to them, they would either have declined the risk altogether, or have called for a higher premium than they otherwise would; and the facts themselves were material. The reception of this evidence was objected to; but the case of *Rickards* v. *Murdock*, supra, was relied on—

Per Cur.—In the case of *Rickards* v. *Murdock*, out of which the present case arises, this kind of testimony was received. In giving judgment upon the motion for a new trial, Lord *Tenterden* did not expressly defend its admissibility, but his words are in the alternative, thus:—"If such evidence is rejected, the Court and jury must decide the point according to their own judgment, unassisted by that of others. If they are to decide, all the Court agree in thinking that the letter was material, and ought to have been communicated,

and that the jury would have been bound to come to that conclusion." Now, this mode of disposing of the question does not appear to the Court, on reflection, to be quite correct; but we think that, as the jury are to decide upon the materiality of the facts, their decision is binding.

HARRATT *v.* WISE, T. T. 1829. K. B. 9 *B. & C.* 712.

THE ship sailed to a blockaded port before notification of the blockade had arrived, although she touched at a port of this country after publication in the Gazette, and when it might have arrived there.

Connected with insurances knowledge is always a question for the jury.

The Court held, that such voyage was not illegal, and that actual knowledge was not to be presumed; but that, as a rule of insurance law, knowledge, like other matters, must be a question of fact for the jury.

KOSTER *v.* REED, M. T. 1826. K. B. 6 *B. & C.* 19.

IN assumpsit on a policy of insurance on goods by a certain ship, it was proved that she sailed on the voyage insured with the goods on board, and never arrived at her port of destination; and that, a few days after her departure, a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved.

The non-arrival of the ship at her destined port within a reasonable time is evidence of loss.

The Court held, that this was sufficient primâ facie evidence of a loss by perils of the sea, and that the plaintiff was not bound to call any of the crew, or to shew that he was unable to procure their attendance.

BLACKETT *v.* ROYAL EXCHANGE ASSURANCE COMPANY, H. T. 1832. Ex. 2 *C. & J.* 244; S. C. 2 *Tyrw.* 266.

IN an action on a policy of insurance, the policy was in the usual form on the ship, and all her furniture and apparel, specifying "boat" free from average, under 3*l.* per cent.

Parol evidence as to the usage at Lloyd's is inadmissible.

The Court held, that parol evidence, to shew the usage at Lloyd's never to allow for loss of boats slung outside, was inadmissible.

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7. *Witnesses.*

HUNTER *v.* LEATHLEY, E. T. 1830. K. B. 10 *B. & C.* 858.

A POLICY was effected "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever or wheresoever in the East Indies, Persia, or elsewhere, &c., upon goods in certain vessels, beginning the adventure from the loading thereof aboard the said ship as above." In an action on the policy—

In an action against the underwriter, the broker who has the policy must produce it, and is a competent witness, though he has a lien on it.

The Court held, that the broker who has effected a policy, and has a lien on it for his premium, may be compelled by the assured to produce it on the trial; and he is a competent witness, notwithstanding his lien, to prove all matters connected with the policy.

8. *Damages*.*

9. *Costs.*

DOYLE *v.* DOUGLAS, T. T. 1833. K. B. 4 *B. & Ad.* 544.

A cause included in the consolidation-rule may be tried again without paying the costs of the first†.

ON motion to stay proceedings in an action on a policy of insurance—

The Court refused to restrain the plaintiff from proceeding to try a second cause against underwriters after a consolidation-rule entered into until the costs of the first action, which had been found against him, were paid.

Interest.

See, also, particular titles, according to the subject-matter and form of action.

I. WHEN OR WHEN NOT RECOVERABLE.
(*a*) BEFORE 3 & 4 WILL. 4, p. 364.
(*b*) SINCE THE 3 & 4 WILL. 4, p. 366.
II. RELATIVE TO INDIA, p. 367.
III. RELATIVE TO SCOTLAND, p. 367.

I. WHEN OR WHEN NOT RECOVERABLE.

(*a*) BEFORE 3 & 4 WILL. 4.

ARNOTT *v.* REDFERN, H. T. 1826. C. P. 3 *Bing.* 353.

Interest is given where money is wrongfully withheld from a creditor‡;

IN an action on a judgment obtained in the Court of Admiralty in Scotland, by which interest was decreed to be paid to the plaintiff for a debt due to him on a contract for work and labour, up to the time when the principal should be discharged, but the defendants withheld the payment, although the plaintiff endeavoured to obtain

* Where, in an action on a policy on a ship for loss by striking on a rock, the jury found that the plaintiff had sustained a partial loss, but to what extent there was no evidence, and that the ship might have been repaired but for the negligence of the resident agents:—Held, that they ought to find for the plaintiff, with nominal damages. (*Tanner* v. *Bennett*, M. T. 1825, N. P., 1 R. & M. 182).

† Where several suits are stayed pending one, and money paid into Court, the plaintiff is entitled to costs in the other suits up to time of such payment. (*Powell* v. *Parkinson*, E. T. 1817, K. B., 6 M. & Selw. 107).

‡ To recover interest on advances of money, a contract must be proved. (*Carr* v. *Edwards*, 1820, N. P., 3 Stark. 132). A contract on a loan of money, to add the interest to the principal at the end of each year, and pay interest on the whole sum as principal, is valid in law, and may be inferred from accounts stated by the debtor on that footing; (*Newal* v. *Jones*, M. T. 1830, N. P., 1 M. & M. 449; S. C. 4 C. & P. 124); but upon a deposit under an agreement, no interest until after demand of the principal:—Held, upon a bankruptcy,

it; the plaintiff had a verdict for the principal only, the point as to the interest being reserved for the opinion of the Court.

Per Cur.—We are of opinion that the jury might give interest, in the shape of damages, for the unjust detention of the money, although the debt arising out of the original contract did not carry interest.

PAGE *v.* NEWMAN, E. T. 1829. K. B. 9 *B. & C.* 378.

THE defendant, a prisoner in France, by an instrument promised, in one month after his arrival in England, to pay the plaintiff, or order, £—— sterling for value received. He arrived in England in 1814, a demand was made in 1818, and in 1819 an action commenced, which was continued until 1828, when the cause was tried.

or it can be implied from mercantile usage.

The Court held, that the same being payable upon a contingency, and the instrument in its language leading to the conclusion that the parties did not intend that interest should be payable up to the time of the principal becoming due, the Court refused to depart from the rule, that interest is not due on money secured by a written instrument, unless it appeared to be so intended on the face of it, or is implied from mercantile usage.

FORSTER *v.* WESTON, T. T. 1830. C. P. 6 *Bing.* 709; S. C. 4 *M. & P.* 589.

THE defendants, by an instrument under seal, bound themselves for the due payment of the sum of 1500*l.*, in three equal payments of 500*l.*, at three, five, and seven months from the date, in failure of which they acknowledged and rendered themselves liable to be sued and proceeded against for the amount.

But an instrument purporting to be a bond, without a penalty, nor any mention of interest, does not carry interest.

Per Cur.—There can be little doubt but that the party proving this agreement intended it to operate as a bond. To constitute a bond, however, there must be a penalty; but here the parties bound themselves to a precise amount to be paid. The consequence is, that this instrument instead of being a bond is what the law calls simplex obligatio. There is nothing in the seal to make a bond carry interest more than if it were not under seal. It seems to us that we should be breaking in upon a general and intelligible rule, if we were to hold interest to be payable upon such an instrument as this: it is neither a mercantile contract, nor one which has the sanction of usage for the allowance of interest.

HARE *v.* RICHARDS, H. T. 1831. C. P. 7 *Bing.* 254; S. C. 5 *M. & P.* 35.

IN an action of assumpsit on the following undertaking:—"We hereby undertake to pay you, agreeably to instructions from Mr. J.

So, interest not payable on an

not to apply to a demand by the assignees. (*Edwards* v. *Vere*, T. T. 1833, K. B., 2 N. & M. 120; S. C. 5 B. & Ad. 282; abridged, ante, tit. *Bankrupt*). And where goods were consigned by a foreign house to their own account, with directions to the defendants to remit the proceeds to the plaintiffs, and advise them of having done so, and the plaintiffs wrote to know the probable amount, to which the defendants replied that they had received the goods with such directions, but had not then disposed of them. The consignors afterwards failing, the defendants retained the proceeds in satisfaction of their own balance:—Held, that the plaintiffs were entitled to recover the amount as money had and received; but the claim for interest could not be supported. (*Fruhling* v. *Schroder*, H. T. 1835, C. P. 2 Scott, 135; S. C. 7 C. & P. 103).

undertaking to pay a sum of money on its arrival from abroad.

R., the sum of 1262*l.* 5*s.* 6*d.* on his account, as soon as we shall have received from Messrs. Rain & Ramsay, of New South Wales, the amount of monies in their hands belonging to Mr. W., and now under attachment by you." The instructions referred to directed that the payment should be taken by the plaintiff in discharge of a bill for 1262*l.* 5*s.* 6*d.* at nine months, which bill the defendants were to receive at the time of payment.

The Court held, that, upon this undertaking, the plaintiff was not entitled to recover interest.

(*b*) Since 3 & 4 Will. 4.

By 3 & 4 Will. 4, a jury may allow interest upon debts,

By 3 & 4 Will. 4, c. 42, s. 28, it is enacted, "That, upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that interest shall be payable in all cases in which it is now payable by law."

and in certain cases give interest in the nature of damages,

By 3 & 4 Will. 4, c. 42, s. 29, it is enacted, "That the jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act."

and allow interest on writs of error*.

And it is further enacted, "That if any person shall sue out any writ of error, upon any judgment whatsoever, given in any court, in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error for the delaying thereof."

Anderson *v.* Arrowsmith, T. T. 1839. Q. B. 2 *P. & D.* 408.

With respect to interest, a party to be entitled to it must use due diligence.

In an action on an indemnity given against charges upon a sale of lands, with sureties, the purchaser having been called on to pay arrears of an annuity, but in the absence of the principal, residing abroad, the jury having found a neglect in suing the sureties.

The Court held, that interest was not recoverable on the sums paid.

* Where judgment is given in a court of error for the defendant in error, the Court is bound under 3 & 4 Will. 4, c. 42, s. 30, to allow interest for the time that execution has been delayed by the writ of error. (*Levy* v. *Language*, M. T. 1838, Ex., 4 M. & W. 337). But the Court of Exchequer Chamber cannot, under 3 & 4 Will. 4, c. 42, s. 30, allow interest upon the damages recovered in a personal action in which error is brought, except when the writ of error is tested, subsequently to the day on which the act received the royal assent. (*Burn* v. *Carvalho*, 1835, Ex. Chamb., 4 N. & M. 893; S. C. 1 Ad. & E. 895).

HOLLIS *v.* PALMER, M. T. 1835. C. P. 2 *Bing. N. S.* 713.

To a declaration on a note given to the plaintiff's deceased testator sixteen years since, alleging that interest only had been paid up to within six years; plea, that the action did not accrue within six years; held on demurrer sufficient, as being substantially an answer to the whole cause of action; and—

Interest payable on a bill or note cannot in a legal sense be separated from the principal.

The Court held, they could not separate the interest from the principal.

BERRINGTON *v.* PHILLIPS, H. T. 1836. Ex. 1 *M. & W.* 48; S.C. 4 *D. P. C.* 758; S. C. 1 *Tyrw. & G.* 322.

A SIGNED bill was delivered on the 1st of November, 1833, and in December the plaintiffs made a demand of interest thereon in writing, according to the 3 & 4 Will. 4, c. 42, s. 28. In June, 1834, a writ of summons was sued out, and the bill at the instance of the defendant was referred for the usual order to be taxed by the Master, who refused to allow the interest. A Judge at Chambers declined to order it to be allowed, on the ground that *that* must be done by the jury.

Where, after action brought on an attorney's bill, it is referred for taxation, the plaintiff cannot proceed with the action to have the interest assessed by a jury.

Per Cur.—The condition to be allowed interest not having been incorporated in the order, we cannot alter the terms of it.

II. RELATIVE TO INDIA.

ANON., 1825. DOM. PROC. 3 *Bing.* 193.

ON the question, whether, according to the construction of the 30th section of an act passed in the 13th year of the reign of his Majesty, Geo. 3, intituled "An Act for the establishing certain Regulations for the better Management of the Affairs of the *East India Company*," the same limits the rate of interest to be taken for loans of any monies to twelve pounds for one hundred pounds by the year; and loans being made or advanced within the dominions of a native independent sovereign by British subjects *domiciliated* and residing within such dominions.

The 13 Geo. 3, as to Indian interest does not apply to British subjects domesticated and resident there.

The House of Lords decided, that the statute, referred to in the question submitted, does not limit the rate of interest on loans made within the dominions of a native independent sovereign by British subjects domiciliated and residing within such dominions to twelve pounds for one hundred pounds by the year.

III. RELATIVE TO SCOTLAND*.

* Assumpsit on a judgment of the Admiralty Court of Scotland, which gave interest on a balance of accounts from 1801 to the time of payment. The contract was by letter, written in London. The services were performed in Scotland, that being the plaintiff's place of residence:—Held, that a contract made in England, to be executed in Scotland, ought to be regulated by the rules of the English law; and that this contract having been made in England, interest could not be recovered, merely because it was given by the decree in Scotland. (*Arnott v. Redfern*, T. T. 1825, N. P., 2 C. & P. 88).

Interpleader*.

I. RELATIVE TO PRIVATE CLAIMANTS.

(*a*) Parties to, p. 369.

(*b*) In what cases interference may be obtained, p. 369.

(*c*) Construction of the interpleader act, p. 371.

(*d*) To what court application for rule to be made, p. 371.

(*e*) Service of, and abandoning rule, p. 371.

(*f*) Declaration, p. 372.

(*g*) Form of the issue, p. 372.

(*h*) Evidence, p. 372.

(*i*) Bringing money into court and taking it out, p. 372.

(*k*) Trial of, p. 373.

(*l*) Verdict and judgment, p. 373.

(*m*) Costs, p. 373.

II. RELATIVE TO SHERIFFS, OR OTHER PERSONS ENGAGED IN THE EXECUTION OF LEGAL PROCESS.

(*a*) Parties to, p. 374.

(*b*) In what cases interference may be obtained, p. 374.

(*c*) To what court application for rule to be made, and of the jurisdiction of the court, p. 376.

(*d*) When application should be made, p. 377.

(*e*) Of the affidavit, p. 377.

(*f*) Bringing money into court, p. 378.

(*g*) Trial of, p. 378.

(*h*) Judgment, p. 378.

(*i*) Costs, p. 379.

* By 1 & 2 Will. 4, c. 58, sect. 1, upon application by a defendant, in an action of assumpsit, &c., stating that the right in the subject-matter is in a third party, the Court may order such third party to appear and maintain or relinquish his claim, and in the mean time stay proceedings in such action.

Sect. 2. Judgment and decision to be final.

Sect. 3. If such third party shall not appear &c., the Court may bar his claim against the original defendant.

Sect. 4. Proviso as to orders made by a single Judge.

Sect. 5. If a Judge thinks the matter more fit for the decision of the Court, he may refer it.

Sect. 6. For relief of sheriffs, and other officers in execution of process against goods and chattels.

Sect. 7. Rules, orders, &c., made in pursuance of this act, may be entered of record, and made evidence. Costs. Writs. Sheriff's fees.

Sect. 8. Upon any application under 1 Will. 4, c. 21, and this act, the Court to exercise such powers, and make such rules as are given by or mentioned in this act.

And see the 1 & 2 Vict. c. 45, s. 2, post, 371.

I. RELATIVE TO PRIVATE CLAIMANTS.

(*a*) Parties to*.

(*b*) In what cases interference may be obtained.

Farr *v.* Ward, M. T. 1836. Ex. 2 *M. & W.* 844.

The statute only applies where the cross claims are on the same subject-matter.

On motion for leave to try under the Interpleader Act, it appeared that the defendant had purchased cattle of the plaintiff, and sent a bill, accepted in blank, for the drawer's name, for the payment, which came into the hands of third parties for valuable consideration; the plaintiff denied that it had ever been received or indorsed by him, and he had commenced an action for the price of the cattle; the holder of the bill also threatening proceedings on it against the defendant.

The Court held, that, it not being shewn that the cross claims were on the same subject-matter, and that the defendant might be liable to one or other of the parties, it was not a case within the act.

Cotter *v.* Bank of England, M. T. 1834. C. P. 2 *D. P. C.* 728; S. C. 3 *M. & Scott,* 180.

A party disclaiming all interest beyond a lien on the chattel may obtain the interference of the Court†.

On an interpleader rule—

The Court held, that a party who makes merely a claim of freight, being a lien upon certain goods in his possession, the property in which is sought by two others, has not such a distinct interest in the goods as will deprive him of the benefit and protection of the Interpleader Act, 1 & 2 Will. 4, c. 58, inasmuch as such claim attaches to the goods themselves, and must be satisfied by that party, whoever he may be, into whose hands the goods may come.

Arayne *v.* Lloyd, M. T. 1834. C. P. 1 *Bing. N. S.* 720; S. C. 1 *Scott,* 609.

But, if the proceedings be stayed by injunction, the Court will not grant the rule‡.

On application for an interpleader rule—

The Court said, we cannot grant the rule where the proceedings are stayed by injunction in the Court of Chancery.

Parker *v.* Lennett, T. T. 1834. K. B. 2 *D. P. C.* 562.

So, a claim as to goods in

Goods in the hands of a constable were claimed by a party charged with stealing them and acquitted, and by the representative

* Where a party to an interpleading rule refused to proceed, the Court refused to substitute another claimant, unless the former were party to the rule for substituting the other. (*Lydal* v. *Biddle,* M. T., 1836, B. C., 5 D. P. C. 244).

† And where an uncertificated bankrupt brought an action for work done by him, and on a reference a certain sum was found to be due to him, which his assignees thereupon claimed from the defendant:—Held, that on a fresh action being brought by the bankrupt, the defendant might call upon the assignees by an interpleader rule to support the claim, and that, upon such rule, the lien of the bankrupt's attorney for his costs in the former action, and the reference, ought to be satisfied out of the amount claimed. (*Jones* v. *Turnbull,* 2 M. & W. 601).

‡ The act does not apply to claims set up in consequence of proceedings in equity. (*Sturgess* v. *Claude,* M. T. 1832, B. C., 1 D. P. C. 505).

criminal custody is not within the statute.

of the party robbed and since deceased, and who had threatened proceedings.

The Court held the case not within the statute, which only applies after action brought and declaration:—Held, also, that where a party has acted with good faith, his costs will be directed to be paid out of the property in dispute, and to be repaid by the unsuccessful party.

Murdoch *v.* Taylor, H. T. 1840. C. P. 6 *Bing. N. S.* 293.

So, a tenant who receives a notice from mortgagee not to pay the rent*;

In an action for use and occupation, a rule under the Interpleader Act had been obtained—

The Court held, a tenant against whom an action for use and occupation has been brought, who applies to the Court under the Interpleader Act in consequence of a mortgagee requiring the rent to be paid to him, is not entitled, on such party abandoning his claim, to be paid his costs by the plaintiff, or out of the rent admitted to be due, and which he offers to pay into Court, such a claim not being within the statute.

James *v.* Pritchard, M. T. 1840. Ex. 8 *D. P. C.* 890; S. C. 7 *M. & W.* 216.

or a claim by an administrator, under a sale;

The defendant having purchased a rick of hay from the plaintiff, and being sued by him for the price, received a notice from a third party, stating that he was the administrator of the owner of the hay, and claiming the sum for which it had been sold.

The Court held, that the defendant was not entitled to relief under the 1st section of the Interpleader Act (1 & 2 Will. 4, c. 58).

Gay *v.* Pitman, H. T. 1838. C. P. 5 *Scott*, 795.—S. P. Grant *v.* Fry, T. T. 1835. C. P. 4 *D. P. C.* 135.

or conflicting claims for a reward offered, are not within the act;

On motion for an interpleader rule, it appeared that the defendant advertised a reward for information leading to the discovery of a felony. Several parties having given information more or less material claimed the reward—

The Court held the case not within 1 & 2 Will. 4, c. 58.

Lucas *v.* London Dock Company, T. T. 1833. K. B. 4 *B. & Ad.* 378.

and it seems the act does not extend to cases where special damage is claimed†.

Goods consigned to the plaintiff in the defendant's warehouses were claimed by a third party, and the plaintiff refused to indemnify the defendants, and brought trover, with counts for specific damage.

The Court refused a rule under 1 & 2 Will. 4, c. 58, but allowed the defendants, on an undertaking to deliver up the goods, to strike out the count in trover, and leave the plaintiffs to proceed for special damage only.

* Where a party has given a promissory note for money due by him, and which is deposited with a third person for the benefit of the creditor, and an action is brought upon it by the trustee, it is no ground for obtaining relief under the 1st section of the Interpleader Act, that an action is anticipated at the instance of the creditor. (*Newton* v. *Moody*, H. T. 1839, B. C., 7 D. P. C. 582).

† The 1st section of 1 & 2 Will. 4, c. 58, (the Interpleader Act), does not apply to actions for unliquidated damages. (*Walter* v. *Nicholson*, E. T. 1838, B. C. 6 D. P. C. 517).

(*c*) Construction of the interpleader act.

Belcher *v.* Maberley, T. T. 1832. C. P. 2 *M. & Scott*, 189.

On the question, whether a party who voluntarily places himself in a situation to be sued is not authorized, under the Interpleader Act, (1 & 2 Will. 4, c. 58), to call on the Court to substitute another defendant.

The act is not compulsory upon the Court, but discretionary only.

Per Cur.—The act of Parliament not being compulsory, but discretionary, it is our duty to see that the party applying for the exercise of our discretion has not voluntarily put himself into the situation from which he calls on us to relieve him. Without applying the word collude in an offensive sense, it seems to us that the defendant has placed himself in the situation in which he now stands at the request, and with a view to the interest of another. The rule, therefore, must be discharged.

(*d*) To what court application for rule to be made*.

(*e*) Service of†, and abandoning rule.

Tucker *v.* Morris, M. T. 1832. Ex. 1 *C. & M.* 73; S. C. 1 *D. P. C.* 639.

Trover for two mares. The defendant had obtained a rule, under the 1st section of the Interpleading Act, against the defendant and one Taylor. It now appeared, from the affidavits of the plaintiff, that the defendant, on being tendered the expenses of keep, &c., had refused to deliver up the mares to the plaintiff, stating that they were claimed by Taylor, from whom he had received an indemnity.

If the goods be delivered up by the party obtaining the rule, on an indemnity from the claimant, the rule will be discharged, with costs.

The Court said, that the defendant, having received an indemnity, had no right to apply for relief under the act; and that, as Taylor, by not appearing, had withdrawn his claim, the rule must be discharged, and the defendant pay the costs.

* Under 2 Will. 4, c. 58, (the Interpleader Act), a Judge could not interfere by summons; (2 D. P. C. 25); but now, by 1 & 2 Vict. c. 45, s. 2, he may. Where process is sued out of different courts, and directed to the same sheriff, he must apply for relief to the respective courts out of which the process issued. (2 Dow. P. C. 151). Thus, where in the K. B. it was made part of the motion, that the rule should include the execution creditor in a Common Pleas cause, so as to save the expense of a separate application to that Court, *Patteson*, J., said it was a point of considerable importance to sheriffs, but he did not think he could be relieved in that way, and granted the rule only in the K. B. causes. Where actions for the same subject were brought in two Courts against an auctioneer:—Held, that he must obtain rules in each Court; and he was required to pay into Court the whole amount of the produce of the goods sold. (*Allen* v. *Gilby*, M. T. 1834, C. P., 3 D. P. C. 143).

† In case of bankruptcy, service of the rule on the execution creditor, petitioning creditor, and provisional assignee, is sufficient. (*Northcote* v. *Beauchamp*, 1 M. & Scott, 158; S. P. *Parker* v. *North*, 1 M. & Scott, 156). A rule on the 1st section of the Interpleader Act cannot be drawn up for a stay of proceedings, unless notice has been given. (*Smith* v. *Wheeler*, H. T. 1835, Ex., 3 D. P. C. 431).

(*f*) Declaration*.

(*g*) Form of the issue.

Pooley *v.* Goodwin, M. T. 1835. K. B. 5 *N. & M.* 466

An issue may vary the ordinary effect of the rules of pleading and evidence.

The Court directed, on an interpleading rule, that the right to receive money should be tried in an action for money had and received.

The Court held, that a special agreement was receivable in evidence, although in other cases it would only be admissible under a special count; and that an affidavit, sworn in the original action by the plaintiff, but not used, and reciting the agreement, might be received as secondary evidence of it, where the loss proved; and it would be presumed to have been properly stamped.

(*h*) Evidence.

Carne *v.* Brice, M. T. 1840. Ex. 8 *D. P. C.* 884; S. C. 7 *M. & W.* 183.

On the question whether goods belonged to the wife's trustee or the husband, on the bankruptcy of the husband, and the goods taken in execution, evidence of the husband's title under the assignees cannot be received.

On an interpleader rule, it appeared that the plaintiff having recovered judgment for the price of certain butcher's meat supplied to Morgan, issued a fi. fa. against him, and was proceeding to take in execution certain property then in Morgan's house, at Hampstead, where he was residing with his wife when the defendants claimed the property as trustees of the wife, on the ground of its having been purchased out of money vested in them for her sole and separate use, under a deed of settlement made before her marriage with Morgan. Ultimately it was arranged that the plaintiff should seize part of the property, and he accordingly took in execution Mrs. Morgan's wearing apparel, which had been bought by her out of the money vested in trustees to her sole use, subject to the question whether the plaintiff was justified in so doing. The form of the issue was assented to by both parties. The defendants offered evidence of Morgan's having become bankrupt, with a view to shew that the property in the wearing apparel did not vest in him, but in his assignees. This evidence was refused by *Gurney*, B., and—

The Court entertained the same opinion.

(*i*) Bringing money into court†, and taking it out.

Cooper *v.* Lead Smelting Company, H. T. 1833. C. P. 9 *Bing.* 634; S. C. 2 *M. & Scott*, 810; S. C. 1 *Dow*, 728.

Where the money has been

On motion for the payment of a sum of money out of Court, which had been paid in under the 1 & 2 Will. 4, c. 58, (the Inter-

* Where the declaration, in an issue under the Interpleader Act, states that "divers goods and chattels" were seized under a fi. fa., and avers that "the said goods and chattels" were the property of the plaintiff, unless the plaintiff proves that the whole of the goods belong to him, the defendant will be entitled to a verdict. (*Morewood v. Wilkes*, 1833, N. P., 6 C. & P. 144).

† An attorney's bill was referred for taxation, but there was no undertaking to pay what should be found due. The amount of the judgment had been previously

pleader Act), to abide the event of a feigned issue, the plaintiff had obtained a verdict, but had not signed judgment—

brought into Court, a rule for taking it out cannot be obtained before judgment signed on the issue.

Per Cur.—Before judgment signed the money cannot be taken out of Court. The proceeding under the Interpleader Act, the 1 & 2 Will. 4, c. 58, is to secure the company against the adverse claims of both parties to the issue. Sect. 2. of the act makes the judgment in any such issue final and conclusive against the parties claiming. Until judgment the company is not secured against future claims by the same parties for the same matter.

(*k*) Trial of issue*.

(*l*) Verdict and judgment.

FORD *v.* DILLON, M. T. 1833. K. B. 2 *N. & M.* 662.

The decision is final against claimants served with the rule, who do not appear and support their claims†.

ON an interpleader rule, the sheriff caused all the parties to the rule to be duly served therewith. The execution creditor did not appear upon the rule, but the adverse claimants appearing, the Court decided as to their rights. On application to open the rule, *Follett*, (amicus curiæ): The Court of Exchequer has decided lately, that when parties neglect to appear upon the rule, having been duly served, they are barred.

Per Cur.—This must be so, for otherwise the act would be almost nugatory.

(*m*) Costs‡.

REEVES *v.* BARRAUD, E. T. 1839. C. P. 7 *Scott*, 281.

A stakeholder who acts bonâ

ON an interpleader rule—

The Court held, that where the stakeholder acts bonâ fide, he will

paid into Court by the sheriff, under an interpleader rule:—Held, that, as the money was not paid in for the purpose of taxation, the Court had no jurisdiction under the 2 Geo. 2, c. 23. (*Rogers* v. *Peterson*, H. T. 1839, Ex., 7 D. P. C. 187; S. C. 4 M. & W. 588).

* Where the declaration on an issue averred that the goods were not the property of the plaintiffs, or either of them; plea, that the goods were the property of the plaintiffs or one of them:—Held, that the defendant had the right to begin, the affirmative lying on him. (*Hudson* v. *Brown*, 1839, N. P., 8 C. & P. 774). Upon an application for relief under the Interpleader Act, the Court will not try the merits of the respective parties upon affidavits. (*Bramidge* v. *Adshead*, E. T. 1833, Ex., 2 D. P. C. 59).

† Verdict on a feigned issue, under the Interpleader Act, must be entered up as sect. 7 of that act directs; and, therefore, a judgment signed in an ordinary manner on such issue was set aside by the Court. (*Dickinson* v. *Eyre*, T. T. 1839, Q. B., 7 D. P. C. 721).

‡ Where assignees succeeded on an issue as to the property passing under a fiat, the money having been paid into Court:—Held, that they were entitled to the costs of trying the issue, and of the application to take the money out, although no application had been made for a consent to do so. (*Meredith* v. *Rogers*, E. T. 1839, B. C., 7 D. P. C. 596). So, where a party succeeds on an issue, directed under the Interpleader Act, he has a right to his costs of applying to take the proceeds of the sale out of Court, although he has not applied to the opposite side for a consent to take the money out. (*Meredith* v. *Rogers*, E. T. 1839, B. C.,

fide is entitled to costs.

be entitled to recover his costs out of the subject matter in dispute, to be borne ultimately by the unsuccessful party.

PITCHES *v.* EDNEY, T. T. 1838. C. P. 4 *Bing. N. S.* 721; S. C. 6 *Scott*, 582.

As an auctioneer, sued for the deposit, is entitled to costs out of the fund, the vendor not appearing.

UPON an interpleader rule—

The Court held, that where a third party does not appear in obedience to a Judge's order, the Court are authorized, under the 3rd section of the Interpleader Act, 1 & 2 Will. 4, c. 58, to allow the stakeholder, an auctioneer, his costs out of the fund, although by such allowance the plaintiff's property in the fund should be diminished, the plaintiff's remedy being against the third person, the wrong-doer; *Coltman*, J., doubting the propriety of making such order where the plaintiff, from circumstances, has no such remedy.

II. RELATIVE TO SHERIFFS OR OTHER PERSONS ENGAGED IN THE EXECUTION OF LEGAL PROCESS.

(*a*) PARTIES TO*.

(*b*) IN WHAT CASES INTERFERENCE MAY BE OBTAINED.

PUTNEY *v.* TRING, M. T. 1839. Ex. 7 *D. P. C.* 811; S. C. 5 *M. & W.* 425; *questioning* STURGESS *v.* CLAUDE, 1 *D. P. C.* 505.

It seems the sheriff is en-

THIS was an application by the sheriff under the 1 & 2 Will. 4, c. 58, for relief from conflicting claims made upon goods seized by

7 D. P. C. 596). Actions, were commenced by two persons claiming to be the lawful owners of a bill of exchange, against the acceptor, the Court directed an issue to try who was lawfully entitled to recover on the bill, and relieved the acceptor from all claim in respect of costs. (*Regina* v. *Serle*, M. T. 1840, B. C., 9 D. P. C. 193). Where an issue directed upon a rule of interpleader, under 1 & 2 Will. 4, c. 58, to try the right, the party succeeding:—Held entitled as against the unsuccessful party to the costs of the application for an order to the stakeholder, who had been ordered to detain the property until the issue decided, and who after that and demand had declined until application had been made to the Court. (*Burnes* v. *Bank of England*, M. T. 1838, B. C., 7 D. P. C. 319). But where, in a feigned issue directed under an interpleader rule, the plaintiff claimed 182*l.* and recovered only 50*l.*, and a Judge at chambers, in the exercise of the discretion given to him by the statute, directed each party to pay his own costs, the Court refused to grant a rule to set aside the order. (*Carr* v. *Edwards*, M. T. 1839, C. P., 8 D. P. C. 29; S. C. 8 Scott, 337). And where an issue is tried by direction of the Court under the Interpleader Act, the unsuccessful party is liable for the costs. (*Bowen* v. *Bramidge*, M. T. 1833, Ex., 2 D. P. C. 213). So, when neither party appears to be in the wrong, the expenses will be directed to be paid by the party ultimately unsuccessful. (*Duear* v. *Mackintosh*, M. T. 1833, C. P., 2 D. P. C. 730; S. C. 3 M. & Scott, 174). And where, on an application under s. 1 of 1 & 2 Will. 4, c. 58, the claimant did not appear, the Court refused to allow the costs of the applicant out of the fund in dispute. (*Lambert* v. *Cooper*, E. T. 1837, B. C., 5 D. P. C. 547). An application by a successful party in an issue directed under the Interpleader Act for costs, &c., may be made before judgment actually signed, but the rule cannot be drawn up except on condition of its being signed. (*Bland* v. *Delano*, H. T. 1838, B. C., 6 D. P. C. 293).

* The Court has power to give a sheriff relief under the Interpleader Act, though the claimant is an infant. (*Claridge* v. *Collins*, T. T. 1839, B. C., 7 D. P. C.

him. For the execution creditor it was contended, that, with regard to some of the claimants, the sheriff was not entitled to relief, their claims being of an equitable nature merely, in respect of which no action could be brought. In *Sturgess* v. *Claude*, (1 D. P. C. 505), *Patteson*, J., says, "I do not think the act applies to claims set up in consequence of proceedings in equity."

titled to the rule though the claim be of an equitable nature*.

Alderson, B.—A party may set up as a legal claim what is, in fact, only an equitable one. The sheriff would in that case be exposed to an action, and ought to be protected. I entertain strong doubt as to the correctness of the decision in *Sturgess* v. *Claude*, (1 Dowl. P. C. 505).

HOLMES *v.* MENTZE, M. T. 1835. K. B. 5 *N. & M.* 563; S. C. 4 *D. P. C.* 300; S. C. 4 *Ad. & E.* 127.

A CLAIM made by a secret partner to goods taken in execution, alleging that they were partnership property, and that, on the balance of accounts, the partner against whom the writ had issued was indebted to the co-partnership—

In a prior case it was said the Court will only interfere when a dispute as to the legal interest has arisen*.

The Court held sufficient to entitle the sheriff to relief under the Interpleader Act, if the fact, that the claimant is a partner, be disputed by the execution creditor. Before the sheriff applies to the Court for relief under the act, he ought to communicate the claim to the execution creditor, for the Court will require such a communication to have been made, in order to be satisfied that there are adverse claims and a legal interest in dispute.

ISAAC *v.* SPILBURY, T. T. 1833. C. P. 2 *D. P. C.* 211; S. C. 10 *Bing.* 3; S. C. 2 *M. & Scott*, 341.

ON an interpleader rule, in which the sheriff was concerned—

At all events an actual claim must have been made;

The Court said, we can under 1 & 2 Will. 4, c. 58, only interfere on behalf of the plaintiff, where an actual claim is made, and not merely quia timet.

BENTLEY *v.* HOOK, H.T. 1834. Ex. 2 *C. & M.* 426; S.C. 2 *D. P. C.* 339.—S. P. TARLETON *v.* DUMELOW, T. T. 1838. C. P. 5 *Bing. N. S.* 110; S. C. 6 *Scott*, 687.

THE sheriff of O. on an affidavit, "that he had received notice that the defendant had become a bankrupt, and had been informed and believed that a fiat of bankruptcy had been issued against him, and assignees chosen," had obtained a rule under the Interpleader Act, calling the assignees and the execution creditor before the Court.

a mere notice of bankruptcy will not do.

Per Cur.—The sheriff must shew that a claim has been made, as

698). Where a new claim was raised after the rule nisi granted, the sheriff allowed to make him a party to the rule. (*Kirk* v. *Clark*, M. T. 1835, Ex., 4 D. P. C. 363).

* Where a sheriff has seized goods under a fi. fa., and a claim to them is put in by another person, he is not bound to accept an indemnity from the execution creditor, but may obtain relief under the 1 & 2 Will. 4, c. 58, s. 6. (*Levy* v. *Champneys*, H. T., 1834, B. C.. 2 D. P. C. 454). And the circumstance of the goods seized being in the possession of a stranger, and not of the defendant against whom the execution issued, does not prevent the plaintiff applying under the act. (*Allen* v. *Gibbon*, M. T. 1833, Ex., 2 D. P. C. 292). But the statute does not apply to a struggle between two execution creditors, each asserting a priority. (*Day* v. *Waldock*, H. T. 1833, B. C., 1 D. P. C. 523),

that is the foundation of our jurisdiction. We cannot, therefore, assist him at present; but he may move the Court to enlarge the return of the writ, and when the claim is made may renew his application.

Scott *v.* Lewis, T. T. 1835. Ex. 2 *C., M. & R.* 289; S. C. 4 *D. P. C.* 259.—S. P. Anderson *v.* Calloway, M. T. 1832. Ex. 1 *C. & M.* 182; S. C. 1 *D. P. C.* 636.

And the goods in dispute must be in his hands*.

On the 31st of January, 1834, a writ of fi. fa. issued to the sheriff of Carmarthenshire, at the suit of Rees Jones against John Jones, and a levy was made on the 1st of February. On the 10th the goods taken in execution were sold, and the proceeds paid over to the judgment creditor; John Jones having become a bankrupt, the plaintiff, who was his assignee, had commenced an action of trover against the sheriff for the goods. On motion on behalf of the sheriff, under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6, to stay the proceedings upon an affidavit which stated the above facts, and also denied all notice of the act of bankruptcy, and all interest in the property and any collusion—

Per Cur.—We should be much disposed to relieve the sheriff if we could, but the case is not within the act of Parliament. That act only applies where the goods or their produce remain in the hands of the sheriff.

Holten *v.* Guntrop, M. T. 1837. Ex. 6 *D. P. C.* 130; S. C. 3 *M. & W.* 145.

Hence a sheriff who withdraws is not entitled to the interpleader rule.

On an interpleader rule, it appeared that the sheriff had gone to the premises for the purpose of levying; but upon a claim having been set up to the goods, he had withdrawn without making any seizure.

Per Cur.—As the goods had never been seized, the sheriff was not entitled to relief.

See Braine v. *Hunt*, 2 *D. P. C.* 391.

(*c*) To what court application for a rule to be made, and of the jurisdiction of the court†.

* The act does not apply to give the sheriff relief after he has parted with the possession of the money or goods claimed. (*Chalon* v. *Anderson*, M. T. 1832, Ex., 3 Tyrw. 237).

† By 1 & 2 Vict. c. 45, after reciting the 1 & 2 Will. 4, c. 58, s. 6, enacts, "That it shall be lawful for any Judge of the said Courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those Courts, or for any Judge of the said Court of Common Pleas, or the county palatine of Lancaster, or Court of Pleas of the county palatine of Durham, (being also a Judge of one of the said three superior Courts), with respect to process issued out of the said Courts of Lancaster and Durham respectively, to exercise such powers and authorities for the relief and protection of the sheriff, or other officer, as may by virtue of the last-mentioned act be exercised by the said several Courts respectively, and to make such order therein as shall appear to be just; and the costs of such proceeding shall be in the discretion of such Judge."

Before that statute, the Court refused to allow cause to be shewn at chambers against a rule nisi, under the Interpleader Act, obtained by the sheriff. (*Shaw* v. *Roberts*, E. T. 1833, Ex., 2 D. P. C. 25). The motion must be made in Court,

(*d*) When application should be made.

Skipper *v.* Lane, H. T. 1834. C. P. 2 *D. P. C.* 784; S. C. 4 *M. & Scott,* 283.—S. P. Beale *v.* Overton, E. T. 1837. Ex. 5 *D. P. C.* 599; S. C. 2 *M. & W.* 534.

The sheriff must apply promptly*.

The sheriff, on the 18th January, received notice after the seizure of a fiat intended to be issued, and on the 28th of a claim by the assignees.

The Court held, that an application by him under the Interpleader Act on the 29th was sufficiently prompt.

Cook *v.* Allen, E. T. 1833. Ex. 1 *C. & M.* 542; S. C. 3 *Tyrw.* 586; S. C. 2 *D. P. C.* 11.

A fi. fa. was issued 10th December, the sheriff did not apply till last day of Hilary Term:—Held too late.

Application was made on the last day of Hilary Term, where the levy was on the 10th of December preceding—

The Court held too late; and that the delay was not excused by the fact, that a rule obtained by the defendant to set aside judgment for irregularity was not discharged until the 23rd of January.

(*e*) Of the affidavit.

Boond *v.* Woodhall, M. T. 1835. Ex. 4 *D. P. C.* 351; S. C. 2 *C., M. & R.* 601; S. C. 1 *Tyrw. & G.* 11.

The sheriff need not deny collusion†.

A rule had been obtained on the behalf of the sheriff under the Interpleader Act, calling upon the adverse claimants to appear and state their claims; but the Master refused to draw up the rule, because there was no denial of collusion in the affidavit.

Lord *Abinger,* C. B.—The act of Parliament does not require that denial in this particular case; the rule may, therefore, be drawn up without it.

but it may be disposed of at chambers. (*Beames* v. *Cross,* T. T. 1835, C. P., 4 D. P. C. 122). One Court cannot interfere to relieve the sheriff where there are execution creditors in suits in different Courts. (*Bragg* v. *Hopkins,* E. T. 1833, B. C., 2 D. P. C. 151.) The jurisdiction of the Court is not at an end upon disposing of the sheriff's rule, but it may after the trial of the issues directed award the costs of the party appearing on the sheriff's rule, and of trying the issue. (*Seaward* v. *Williams,* H. T. 1833, B. C., 1 D. P. C. 528). The Court has no power under the Interpleader Act to dispose summarily of the matter in dispute between the parties, who appear on the sheriff's rule, without the consent of both plaintiff and claimant. (*Carlews* v. *Pocock,* H. T. 1836, B. C., 5 D. P. C. 381). On an application to a Judge at chambers, under an Interpleader Act, an order was made, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed. The Court refused to grant a rule nisi for varying the order, by introducing a fresh term into the reference in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers. (*Drake* v. *Brown,* T. T. 1835, Ex., 2 C., M. & R. 270).

* And where he had suffered an action to be brought, and kept possession of the goods for several months:—Held, that he had made his election, and the rule discharged with costs of all parties. (*Devereux* v. *Johns,* H. T. 1833, B. C., 1 D. P. C. 548).

† In order to obtain relief under the Interpleader Act. (*Dobbins* v. *Greene,* E. T. 1834, B. C., 2 D. P. C. 509; S. P. *Donniger* v. *Hinxman,* M. T. 1833, B. C., 2 D. P. C. 424).

(*f*) Bringing money into court*.

(*g*) Trial of.

Poweler *v.* Lock, E. T. 1835. K. B. 4 *N. & M.* 852; S. C. 4 *Ad. & E.* 415.

The claimant must appear and state the nature of his claim by affidavit†.

A sheriff obtained a rule under the Interpleader Act, calling upon an execution creditor, and a third party who claimed goods seized by the sheriff under a fi. fa., to appear and state the nature of their claims. The third party did not appear and state by affidavit the nature of his claim. It was stated, that, if the Court are of opinion that the claimant must state the nature of her claim by affidavit, it is prayed that she may be allowed to do so before a Judge at Chambers.

Lord *Denman*, C. J.—There appears to have been a misconception of the act. We think that you may have time to appear by affidavit. Cause to be shewn at Chambers in a week.

Angus *v.* Wootton, H. T. 1838. Ex. 3 *M. & W.* 310.

The execution creditor is entitled to be heard without an affidavit.

The adverse claimant objected to the right of the execution creditor to be heard, inasmuch as he had no affidavit; but—

Per Cur.—The party there objected to was the claimant. It is not necessary that the execution creditor should produce an affidavit.

(*h*) Judgment.

Lewis *v.* Eickey, M. T. 1834. Ex. 2 *C. & M.* 321; S. C. 2 *D. P. C.* 337; S. C. 4 *Tyrw.* 157.

If the claimant does not appear, the decision is final‡.

Upon the sheriff taking the goods, the defendant gave notice that they were the property of a third party; who, upon the rule obtained by the sheriff under the Interpleader Act, did not appear.

The Court made a rule barring his claim, with costs of the sheriff's application, to be paid by the defendants.

* Where the money is brought into Court, and the claimant abandons his claim, the rule for taking it out by the execution creditor is only *nisi*. (*Stanley* v. *Perry*, H. T. 1836, B. C., 4 D. P. C. 599; S. C. *Ostler* v. *Bower*, H. T. 1836, B. C., Id. 605).

† Where, in an interpleader rule, neither the plaintiff nor claimant appears, the Court will discharge the sheriff from actions by either of those parties, and permit him to levy his poundage and expenses, and abandon the remainder of the levy. (*Everleigh* v. *Salsbury*, M. T. 1836, C. P., 5 D. P. C. 369; S. C. 3 Bing. N. S. 298; S. C. 3 Scott, 674).

‡ Where, upon a rule obtained under the Interpleader Act, the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequent to the seizure, the Court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an action against the sheriff for misconduct, provided it should turn out that he had been guilty of any; and also, if there had been any misconduct in the execution creditor in giving directions to the sheriff, to bring an action against him. (*Lewis* v. *Jones*, E. T. 1837, Ex., 2 M. & W. 203).

DOBLE *v.* CUMMINS, H. T. 1837. K. B. 7 *A. & E.* 580; S. C. 2 *N & P.* 575.

GOODS being seized by the sheriff under a fi. fa., were claimed adversely to the execution creditor. On an interpleader rule, obtained by the sheriff under stat. 1 & 2 Will. 4, c. 56, s. 6, the claimant and the sheriff appeared, but not the execution creditor. The claimant supported his title by affidavit. If the Court order that the party be barred,

The Court refused to order generally that the execution creditor should be barred of his demand, but made a rule that the sheriff should withdraw from possession, and the execution creditor take no proceedings against him in respect of the goods non-claimed.

(*i*) COSTS.

WEST *v.* ROTHERHAM, T. T. 1835. C. P. 2 *Bing. N. S.* 527; S. C. 2 *Scott*, 802.

THIS was an interpleader rule, on a question arising as to costs. the costs are not allowed in ordinary cases to the sheriff*,

The Court said, costs are not allowed in ordinary cases, upon applications under the statute by the sheriff.

* Before the sheriff applies to the Court under the Interpleader Act, he is bound to inquire into the nature of the claim set up; and therefore, if he brings parties before the Court in consequence of a claim which is clearly bad in point of law, the Court will compel him to pay the costs. (*Bishop* v. *Hinxman*, T. T. 1833, B. C., 2 D. P. C. 166). And where, upon an application under the act, rent was ordered to be paid to the landlord, who had been brought before the Court, upon giving security:—Held, that the sheriff must pay the expenses of such security. (*Clarke* v. *Lord*, M. T. 1833, Ex., 2 D. P. C. 227). And the Court will, under 1 & 2 Will. 4, c. 58, s. 6, make the party claiming adversely, but who does not appear to support his claim, pay the costs of the execution creditor, but not of the sheriff; but it will allow him the costs of a second appearance, where the adverse claimant afterwards applied to open the rule. (*Bowdler* v. *Smith*, E. T. 1832, K. B., 1 D. P. C. 417; S. P. *Bryant* v. *Skey*, T. T. 1832, B. C., Id. 428). And where the goods are taken in execution, and a claim was set up under a bill of sale, which bore date after the levy, the Court discharged the sheriff's application for relief, and made him pay the costs of the execution creditor. (*Sheriff of Oxfordshire, In re*, M. T. 1837, Ex., 6 D. P. C. 136). So, where the landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the Court will make the sheriff pay the costs of appearing. (*Clarke* v. *Lord*, E. T. 1833, Ex., 2 D. P. C. 55). So, if the sheriff be guilty of laches in making his application, he must pay the costs of both parties. (*Beale* v. *Overton*, E. T. 1837, Ex., 5 D. P. C. 599; S. C. 2 M. & W. 534). If an order for an issue is made by consent at chambers by a single Judge, for the relief of the sheriff, under sect. 6 of the Interpleader Act, it is necessary for the successful party to come to the Court, to obtain an order for his costs. (*Matthew* v. *Sims*, M. T. 1836, B. C., 5 D. P. C. 234). Unless there is any thing to shew that the consent of the parties is vexatious, the sheriff is not entitled to be paid his costs by the claimant of the goods, upon an arrangement being made between the parties. (*Cox* v. *Fenn*, M. T. 1838, Ex., 7 D. P. C., 50). But where a claim is made by one on behalf of another, for goods seized by the sheriff in execution, and upon a rule being obtained under the Interpleader Act, neither party appears to shew cause, the plaintiff is not entitled to receive his costs from the sheriff; but the sheriff and plaintiff are both entitled to their costs from the claimant or his agent, upon a rule to shew cause. (*Philby* v. *Skey*, M. T. 1833, Ex., 2 D. P. C. 222). And where the claimant of the goods taken in execution did not appear to the rule, ordered, that his claim should be barred, and that he should pay the costs of the execution creditor of shewing cause, unless cause shewn against such payment of costs within six days. (*Perkins* v. *Benton*, H. T. 1832, Ex., 3 Tyrw. 52). So, where an issue is directed, the party succeeding

THOMPSON *v.* SHEDDON, T. T. 1834. C. P. 1 *Scott*, 697.

unless gross misconduct in the party against whom they are asked.

UNDER an interpleader rule the Court will only give the sheriff his costs on an application under the act where there has been gross misconduct in the party against whom they are asked, and refused where he came after notice that the claim had been abandoned.

UNDERDEN *v.* BURGESS, T. T. 1835. B. C. 4 *D. P. C.* 104.

But costs were allowed the sheriff for keeping possession pending a reference to the Master*.

THE sheriff applied to be allowed the costs of keeping possession until the Master had determined the question between the parties.

Coleridge, J.—If the sheriff were to sell he must give some notice previously. The Master will probably be able to make his report in a few days. The sheriff shall therefore have his costs of keeping possession after a week from the present time, if the Master shall not have sooner made his report.

FIELD *v.* COPE, E. T. 1832. Ex. 2 *C. & J.* 480; S. C. 2 *Tyrw.* 458; S. C. 1 *D. P. C.* 567.

But, where the execution creditor does not appear, the Court will not give the sheriff the costs of the rule or the money for keeping possession.

THIS was a rule under stat. 1 & 2 Will. 4, c. 58, s. 6, calling upon the assignees and the plaintiffs to state their claims, which was subsequently enlarged by reason of the non-appearance of the plaintiffs, and a further rule was granted for the sheriff to be at liberty to withdraw from the possession of the goods. Both these rules came on, and the plaintiffs not appearing—

Per Cur.—The duty of executing the writ is cast upon the sheriff by law, and he might possibly have sold the goods immediately. He comes here for an indulgence and ought not to have the costs.

STALEY *v.* BEDWELL, E. T. 1839. Q. B. 10 *Ad. & E.* 145; S. C. 2 *P. & D.* 309.

If a claimant shews his title only to part he is entitled to costs.

A SHERIFF, under a writ against the goods of A., had also seized the goods of B., and the question as to the title to the property was made the subject of a proceeding under the Interpleader Act.

The Court held, that the sheriff must have the costs of appearing in the first instance, but not those of a subsequent application for

may apply for costs of the issue, interpleading rule, and of the application, before the judgment was signed, on undertaking to sign it; but the Court would not order the sheriff to pay costs, unless misconduct were shewn; and where he effects a sale, and pays the proceeds by order into Court, for the benefit of all parties, he will be allowed to deduct the expenses of the sale. (*Bland* v. *Delano*, H. T. 1838, B. C., 6 D. P. C. 293). So, where a claimant, after an application under the Interpleader Act, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue, and of the application of those costs. (*Scales* v. *Sargeson*, T. T. 1835, Ex., 4 D. P. C. 231). Where the claimant did not appear, but the rule did not call upon him to shew cause against the payment of costs, the Court made the order only conditionally, on his not appearing within a certain time. (*Shuttleworth* v. *Clark*, H. T. 1836, B. C., 4 D. P. C. 561). Where no blame attached to the execution creditor, the Court refused to make any party pay costs. (*Morland* v. *Chitty*, H. T. 1833, K. B., 1 D. P. C. 520).

* The Court refused the sheriff the costs of keeping possession in consequence of a party refusing to consent to the decision of a Judge at chambers, the act not authorizing a Judge to interfere for the relief of the sheriff. (*Clarke* v. *Chetwode*, H. T. 1836, B. C., 4 D. P. C. 635).

the distribution of the fund in Court. A claimant under the Interpleader Act, who complains that some of his goods have been seized in an execution against a third person, is in the same situation as a plaintiff in trover, and must have his costs in the same way.

GLASIER *v.* COOKE, M. T. 1835. K. B. 5 *N. & M.* 680.

A plaintiff abandoning an execution should not appear, and if he does he will not be entitled to his costs.

A FI. FA. issued at the suit of the plaintiff; the sheriff's officer informed the plaintiff's attorney that the defendant's goods had been seized under a prior writ. The plaintiff did not withdraw his writ, or give notice that he withdrew his claim. A third party having claimed the goods, the sheriff obtained a rule under the Interpleader Act, and the plaintiff withdrew his execution. It was contended that the rule ought to be discharged with costs—

Lord *Denman*, C. J.—There was no occasion at all for the plaintiff to appear, if he intended to relinquish. He is certainly not entitled to costs.

TILLEARD *v.* CAVE, M. T. 1839. C. P. 6 *Bing. N. S.* 251.

If the sheriff amends the rule for his benefit he is liable to the costs.

ON an interpleader rule, the sheriff obtained an order for amending the rule, being for his own use, and in fact only a prolongation of the hearing before the Judge—

The Court refused him the costs of appearing on that rule.

LEVY *v.* CHAMPNEYS, T. T. 1836. K. B. 4 *Ad. & E.* 365.

With respect to costs, the Court will act upon the interpleader rule, though it has not been continued.

A SHERIFF having taken goods in execution, which were claimed by a third party, obtained an interpleader rule. The parties appeared, and a rule was made that the parties should appear in the next term and maintain or relinquish their claims, &c., and that in the mean time the sheriff should continue in possession till further order of the Court, and proceedings against him be stayed, and that a feigned issue should be tried between the claimants at the next assizes. The issue was tried, and the third party obtained a verdict against the execution creditor. The latter obtained a rule for a new trial, which rule, after the lapse of five terms, was discharged. The sheriff had, by direction of the execution creditor, quitted possession before the rule for a new trial. The interpleader rule had never been enlarged, or in any manner formally continued.

The Court held, that they might nevertheless act upon the interpleader rule for the purpose of awarding to the successful party his costs of appearing to the sheriff's rule, and costs of keeping possession of property incurred by such party.

Interlocutory Judgment. See tit. *Judgment.*

Interrogatories*.

BRYDGES *v.* FISHER, H. T. 1834. C. P. 4 *M. & Scott*, 458.

Under 1 Will. 4, c. 22, the application for a commission must be made promptly after issue joined†.

J. BRYDGES, the plaintiff, and a person named M'Donald, were appointed to distribute certain Portuguese prize-money, and by desire of both, the defendant, the confidential clerk of M'Donald, was authorized to draw cheques for the money: M'Donald became a bankrupt, and it was discovered that considerable sums had been drawn through the instrumentality of the defendant, and applied to purposes different from those intended, and to which the money was appropriated. Upon the trial, the defendant's justification was the authority given by M'Donald, and he having gone abroad, an application was made for a commission to examine him—

The Court held, that the application for a commission, under 1 Will. 4, c. 42, must be promptly made after issue joined. Where there had been delay, the Court allowed the commissioner, but refused to postpone the trial.

* By 1 Will. 4, c. 22, s. 1, powers of the 13 Geo. 3, c. 63, as to the examination of witnesses in India extended to the colonies, &c., and to all actions in the Courts at Westminster, when examination by commission shall appear necessary.

Sect. 2. Judges to whom the commission is directed, empowered to enforce the attendance of witnesses.

Sect. 3. Costs of writs to be in the discretion of the Court.

Sect. 4. Courts at Westminster, Lancaster, and Durham, may order the examination of witnesses within their jurisdiction by an officer of the Court, or may order a commission for that purpose out of their jurisdiction.

Sect. 5. Attendance of witnesses on production of documents, how to be enforced. Disobedience to be deemed a contempt of Court. Payment of expenses. Proviso defining to what documents the act shall extend.

Sect. 6. Prisoners may be removed by habeas corpus for examination.

Sect. 7. Examinations of witnesses to be taken upon oath. Persons giving false evidence to be deemed guilty of felony.

Sect. 8. Persons appointed for taking examinations to report to the Court upon the conduct or absence of witnesses, if necessary.

Sect. 9. Costs of the order for examination may be made costs in the cause.

Sect. 10. Restriction as to the reading of examinations or depositions without consent of the party.

Sect. 11. Proviso as to Judges of Durham.

† Where a witness being examined by interrogatories was asked as to certain parts of a paper signed by him, and a portion of his cross-examination and re-examination founded thereupon, and the paper annexed to his deposition:—Held, that the paper could *not* be read as a part of the cross-examination; but if read, must be taken as evidence for the party reading it. (*Stephens* v. *Foster*, M. T. 1833, N. P., 6 C. & P. 289). But where the examination on interrogatories is read by the plaintiff, the defendant is entitled to have the cross-interrogatories also read as part of the plaintiff's case, and not of his own. (*Temperley* v. *Scott*, H. T. 1832, N. P., 5 C. & P. 341).

Intrusion, Writ of.

See also, post, tit. *Writ of Right*, where the new statutes will be referred to and abridged.

ATTORNEY-GENERAL *v.* PARSONS, T. T. 1836. Ex. 5 *D. P. C.* 165; S. C. 2 *M. & W.* 23; S. C. 1 *T. & G.* 23.

The Crown may have to prove title in the first instance, but the Crown may lay the venue in any county, or remove it at pleasure.

ON a writ of intrusion, the defendant proved that the encroachment in question had been made for more than twenty years, and claimed to have a verdict in his favour. The jury found for the Crown.

Per Cur.—The object of the statute is simply to provide, that, after a possession of twenty years, the defendant shall not be bound to set out his title by a special plea, which otherwise he would have been bound to do. The proof of title in that case is thrown on the Crown. The Crown has a right to lay the venue in any county; or, when laid in a particular county, to change it, or to have the inquisition in any other county.

PIERCY *dem.*, GARDNER *ten.*, M. T. 1836. C. P. 3 *Bing. N. S.* 748; S. C. 4 *Scott*, 512.

The limitation as to a writ of intrusion fell within the 32 Hen. 8, c. 2, and not the 21 Jac. 1, c. 8.

ON a writ of intrusion by the remainder-man, after the determination of the estate pur autre vie—

The Court held, 1st, he was entitled to maintain the writ of intrusion, although the title of the tenant for life was only equitable, and created by devise to trustees, who were to receive the rents, and pay them over to the cestui que vie; and, 2ndly, that such writ falls within the 32 Hen. 8, c. 2, and not within the 21 Jac. 1, c. 16, and might have been maintained when brought on a seisin within fifty years.

WILLIAMS *dem.*, HARRIS *ten.*, T. T. 1834. C. P. 4 *M. & Scott*, 358; S. C. 1 *Bing. N. S.* 13.

The officer will not tax costs on a nol. pros., on a writ of intrusion, without leave of the Court; and the Court refused to interfere.

THE demandant sued out a writ of intrusion in October, 1832, and the tenant was summoned therein to appear on the 7th of November, which he accordingly did. The demandant did not declare until the 31st of January, 1833; on the 4th of March, the tenant pleaded twenty-three pleas; and on the 25th of June the demandant was ruled to reply, and, after much delay, he joined issue on nine, and demurred to the remainder of these pleas. After additional delays, he entered a nolle prosequi in the cause on the 22nd of April. Upon the 24th of that month an application was made, on the part of the tenant, at the Prothonotary's office, for a certificate of the nolle prosequi being entered, for the purpose of procuring an appointment thereon to tax the costs of the tenant, but the application was refused. The officer also stated that he did not deem himself, under any circumstances, justified in taking his costs for the tenant, without the authority of the Court.

The Court held, that in a real action he was not entitled to recover the costs.

I. O. U.

SLADE *v.* TREW, E. T. 1833. Ex. 1 *C. & M.* 584; S. C. 2 *D. P. C.* 65; S. C. 3 *Tyrw.* 804.—S. P. ROBERTS *v.* WRIGHT, T. T. 1831. Ex. 1 *C. & J.* 547; S. C. 1 *Tyrw.* 532.

In an action on an I. O. U., the Court changed the venue.

ON motion to change the venue, in an action on the following agreement:—"I have this day borrowed of Slade 250*l.*, at 5*l.* per cent. interest, and have deposited security in his hands, and promise to pay it next July the 1st; and if not then, the said — Slade to have a right to call for a mortgage of the premises. Dated January 31st, 1832.—Mem., that 50*l.* since borrowed is on the same terms."

Per Cur.—The venue cannot be changed, unless upon some special ground, in actions upon instruments under seal; but there are numerous instances in which it has been changed in actions upon written contracts not under seal. It has been changed in an action upon an I. O. U., and this case seems to be within the same principle.

FOSS *v.* WAGNER, H. T. 1838. Q. B. 6 *Ad. & E.* 116.

If one be read* by inadvertence, it cannot be objected to for want of stamp.

IN an action for money had and received, and on an account stated, an I. O. U. instrument had, whilst counsel were engaged, been inadvertently read.

The Court held, that it was too late afterwards to object to the want of a stamp, and withdraw it from the jury.

Ireland†. See also ante, tit. *Foreign Country.*

* An I. O. U., not addressed to the plaintiff, is primâ facie evidence it was given to him. (*Curtis* v. *Rickards*, T. T. 1841, C. P., 1 M. & G. 46; S. C., 1 Scott, N. S. 155).

† Under the words in a local act, "of parts beyond the seas," Ireland is excluded. (*Battersby* v. *Kish*, H. T. 1836, C. P., 2 Bing. N. S. 585; abridged ante, tit. *Foreign Country*). Upon the question upon the Statute of Limitations beginning to run against a party absent in Ireland at the time of the cause of action accruing, whether Ireland was a place beyond seas within 4 Ann., c. 16, s. 19:—Held, that the 3 & 4 Will. 4, cannot be construed to extend to the 4 Ann. c. 16, and that Ireland is not by the act of Union constructively brought within those limits. (*Lane* v. *Bennett*, 1 M. & W. 70; S. C. 1 Tyrw. & G. 441).

Irregularity*.

See also particular Titles.

FYNN *v.* KEMP, E. T. 1834. Ex. 2 *D. P. C.* 620; S. C. 4 *Tyrw.* 990.

In term time where the irregularity occurred seven days before the application:—Held, too late.

ON the 15th of April, the plaintiff delivered a declaration de bene esse, and on the 16th an appearance was entered; on the 18th the plaintiff demanded a plea, and, on the 22nd, motion was made to set aside the proceedings.

Per Cur.—If it were a question of time only we think seven days too long; but, at all events, the defendant was bound to come to the Court before the next step was taken.

MOORE *v.* STOCKWELL, M. T. 1826. K. B. 6 *B. & C.* 76.

Taking out a summons to put in and justify bail is a waiver of an irregularity in the writ.

THE writ was returnable the next day after the end of the term; however the defendant, after the return day of the writ, took out a summons for time to put in special bail, and the plaintiff thereupon consented to allow a week for that purpose. Special bail not having been put in the plaintiff took an assignment of the bail-bond, and commenced an action upon it. A rule had been obtained to set aside the latitat for irregularity.

Per Cur.—This was a mere irregularity, and was waived by the defendants having taken out a summons to put in and justify bail.

Issuable Pleas. See tit. *Pleas.*

* No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time; (this rule is construed with reference to the time when the applicant first had knowledge of the irregularity); (2 Dowl. P. C. 293); nor if the party applying has taken a fresh step after knowledge of the irregularity. (H. T. 2 Will. 4, 2 Dowl. P. C. 36). By Rule M. T., 3 Will. 4, it is ordered, if the plaintiff or his attorney shall omit to insert in or indorse on any writ, or copy thereof, any of the matters required by 2 & 3 Will. 4, c. 39, to be inserted therein, or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any Judge. (See 1 Dowl. P. C. 432; 3 M. & Scott, 7; post, tit. *Process*). Where a proceeding is irregular the party has a right to have it set aside; and if it be not made a term at the time of disposing of the rule, the Court has no power afterwards to restrain the defendant from bringing an action. (*Abbott* v. *Greenwood*, H. T. 1839, B. C., 7 D. P. C. 534). And where a Judge at chambers refused to interfere:—Held, that to prevent judgment from being signed, a plea should be delivered under a protest. (*Tory* v. *Stevens*, H. T. 1838, B. C., 6 D. P. C. 275). It is a fixed rule, that the motion to set aside proceedings for irregularity must be promptly made, and the party being a prisoner makes no difference. (*Primrose* v. *Baddeley*, H. T. 1834, Ex., 2 D. P. C. 350). And where the defendant's attorney suffered the plaintiff to proceed in ignorance of the entry of an appearance to file a declaration, and sign judgment without demanding a plea, the Court would not allow him to avail himself of the irregularity and vacate the judgment. (*Rutty* v. *Auber*, E. T. 1833, Ex., 2 D. P. C. 36; S. C. 3 Tyrw. 591). In King's Bench, a rule may be made for setting aside proceedings for irregularity, with a stay of proceedings in the mean time, although no notice of such motion has been given. (*Shatton* v. *Regan*, T. T. 1834, B. C., 2 D. P. C. 585).

Issue*.

HART *v.* DALLY, M. T. 1833. Ex. 2 *D. P. C.* 257.

The issue must be prepared according to the form given by the Judges.

THIS was an application to set aside the issue made up in the old form, with a memorandum that the plaintiff was a debtor to the king, and brought this bill into court, &c.; the action having been commenced by writ of summons.

The Court set the issue aside, not being in conformity with the new Rules.

DICKENSON *v.* REYNOLDS, H. T. 1834. Ex. 2 *C. & M.* 474; S. C. 4 *Tyrw.* 374.

Where a declaration was delivered in Michaelmas Term, and the plea 11th Jan.:—Held, that the issue might be made up of M. T.

ON motion to set aside proceedings, it appeared that the declaration was delivered as of Michaelmas Term, and the plea was delivered on the 11th of January, being the first day of Hilary Term, and the issue was afterwards made up and delivered as of Michaelmas Term.

The Court refused to grant a rule for setting aside the issue, it not appearing that the plea had not been delivered before the sitting of the Court on the first day of term, or that any damage had resulted to the defendant therefrom.

BALL *v.* HAMLET, M. T. 1834. Ex. 1 *C., M. & R.* 575; S. C. 3 *D. P. C.* 188; S. C. 5 *Tyrw.* 201.

The issue must state the dates†, but need not the form of action.

ON motion to set aside the issue and notice of trial in this case, on the ground of the omission of the form of action, and of the dates of the pleadings.

* By Rule H. T., 2 Will. 4, the issue must be intitled of the same court, month, and year as the declaration. The issue concludes with an award of venire, and by sect. 2, 3 & 4 Will. 4, "it may be returnable forthwith;" and by H. T., 2 Will. 4, if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, in making up the issue or demurrer books, may, if he think fit, insert it for him, but the costs of such insertion shall be in the discretion of the taxing officer. (See 2 Stra. 1241; 1 Wils. 97). By Rule H. T., 4 Will. 4, in all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter, the plaintiff may proceed without giving a rule to enjoin. The form of stating the issue given by the schedule to the Rules of Hil. T., 4 Will. 4, may be varied according to the true facts of the case; where, therefore, the issue stated the arrest upon a capias utlagatum, in 1834, although it did not go on to state that the outlawry had been set aside:—Held, that it would be presumed unless the contrary shewn. (*Harvey* v. *O'Meara*, T. T. 1840, B. C., 8 D. P. C. 676). The rule to enter the issue is, by the operation of 15 Reg. Gen. Hil. T., 4 Will. 4, abolished. (*Hodges* v. *Diley*, H. T. 1839, B. C., 7 D. P. C. 555; S. P. *Wilks* v. *Dodd*, 3 Scott, 769). Where the issue contained an &c. after the replication, and no similiter was added, but it was properly added on the Nisi Prius record:—Held, that there was sufficient to justify the presumption of a perfect record, or that the party would make a perfect one, and rule for arresting the judgment discharged; and semble the rule of Trinity Term, 2 Will. 4, c. 65, was intended only to apply to causes tried in term. (*Brook* v. *Finch*, H. T. 1837, B. C., 6 D. P. C. 313). Quære, whether the adding of the similiter by the party who takes an issue is a joining of issue, within the 21 Jac. 1, c. 23, s. 2? Quære, whether the entry of a claim to goods taken under process of foreign attachment is tantamount to an arrest or an appearance, from which the six weeks for joining issue are to be calculated, under 21 Jac. 1, c. 23, s. 2? (*Brine* v. *Waite*, H. T. 1840, C. P., 1 M. & G. 2).

† The omission to transcribe into the issue delivered the dates of the pleadings constitutes a variance, of which the defendant is entitled to avail himself after

Parke, B.—The form of the issue given in the new Rules of Hil. T., 4 Will. 4, does not specify the form of action as a matter to be inserted, and it cannot be necessary that it should. As to the dates, they ought to be introduced.

SHACKEL *v.* RANGER, E. T. 1838. Ex. 3 *M. & W.* 409.

APPLICATION to set aside the notice of trial, and subsequent proceedings in this case, for irregularity; which consisted in the plaintiff having added a similiter without a date, for the defendant, to the replication, which took issue upon the pleas.

The rule as to the date of the pleadings does not apply to a mere added similiter.

The Court held, that the defendant was not entitled to set aside the notice of trial and subsequent proceedings for irregularity, upon the 1st Rule of Hil. Term, 4 Will. 4.

WATTS *v.* BALL, E. T. 1840. C. P. 8 *D. P. C.* 589; S. C. 1 *Scott, N. S.* 173.

ON motion for leave to amend, it appeared that the copy of the issue, delivered to the defendant, was dated 1839, instead of 1840, and blanks were left for the date of the teste and return of the writ of trial, the writ itself and the roll being correct. The trial having taken place, under protest—

An issue may be amended, if the teste and return of the writ be left in blank.

The Court allowed an amendment, upon payment of costs.

Jeofails. See tits. *Judgment—Pleading.*

Joinder. See tits. *Indictment—Misjoinder.*

Joint Insurance. See tit. *Insurance.*

Joint Stock Companies*.

See tits. *Corporation—Railways.*

I. RELATIVE TO WHAT COMPANIES ARE OR ARE NOT ILLEGAL, p. 388.

trial, and the roll is made up, although the dates appear in the roll. (*Worthington* v. *Wigley*, T. T. 1836, C. P., 5 D. P. C. 209; but see supra). In the issue, the date of the writ of summons was wrongly stated; the word defendant was used instead of defendants, and the award of venire was to the *then* sheriff:—Held, that these errors were no ground for setting aside the issue, but that the proper course was to apply to a Judge at chambers to amend it, at the plaintiff's costs. (*Ikin* v. *Plevin*, E. T. 1837, Ex., 5 D. P. C. 594).

* The 7 Geo. 4, c. 64, regulates joint-stock companies; and the 1 & 2 Vict. c. 96, enacts,—sect. 1. Banking co-partnerships may sue and be sued.

Sect. 2. Proceedings in an action may be pleaded in bar of any other action.

II. RELATIVE TO CALLS, p. 389.

III. RELATIVE TO THE RIGHTS AND LIABILITIES OF SHAREHOLDERS.

(*a*) As regards themselves.

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(*b*) As regards third parties.

1. *Where the Company is formed,* p. 393.
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VII. RELATIVE TO ACTIONS BY AND AGAINST.

(*a*) Form of, p. 397.
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VIII. RELATIVE TO JOINT-STOCK COMPANIES IN IRELAND, p. 404.

I. RELATIVE TO WHAT COMPANIES ARE OR ARE NOT ILLEGAL.

Nockels *v.* Crosby, H. T. 1825. K. B. 3 *B. & C.* 814; 5 *D. & R.* 751.

A scheme having rather an advantageous than a mischievous pur-

The plaintiff paid the amount of certain shares in a tontine society proposed to be established, under the management of directors, who were to lay out the funds, make regulations, &c., according to an agreement, signed by the plaintiff and other subscribers; at the end of the year the shares to be issued and transferrable; but

Sect. 3. Extending provisions of 7 Geo. 4, c. 46.
Sect. 4. A member's share in capital of partnership not to be set off against any demand which such partnership may have against him.
Sect. 5. Continuance of act.
Sect. 6. Act may be amended this session.

And 1 & 2 Vict. c. 96, was continued by 2 & 3 Vict. c. 68, and 3 & 4 Vict. c. 111, and made perpetual by 5 & 6 Vict. c. 85.

no shares were ever issued, and the directors finally abandoned the project.

The Court held, that such scheme having rather an advantageous than a mischievous purpose, or one likely to tend to the grievance of the King's subjects, was not unlawful within the 6 Geo. 1, c. 18.

pose, was not unlawful within the Bubble Act, (6 Geo. 1, c. 118).

BOOTH *v.* THE BANK OF ENGLAND, M. T. 1840. C. P. 2 *Scott, N. S.* 701; 6 *Bing. N. S.* 415.

A LONDON joint-stock bank agreed with a bank in Canada, that G. P., manager of the London joint-stock bank, but not a partner therein, should accept bills, drawn by the Canadian bank, payable at a date earlier than six months; and that the London joint-stock bank would provide funds for the due payment of such bills.

The Court held, 1st, that the acceptance of such bills, in execution of such agreement, was unlawful, regard being had to the acts in force respecting the Bank of England; 2ndly, and would not have been lawful even if the London joint-stock bank, at the time of such acceptances, had in their hands funds of the Canadian bank equal to the amount of the bill; 3rdly, nor if without such funds, in the hands of the London joint-stock bank, the bills had been accepted by G. P., on the credit of a contract by the Canadian bank to remit such funds to meet the acceptances; 4thly, that the Bank of England might maintain an action against the London joint-stock bank founded on such transactions.

But it is unlawful for a joint-stock bank to accept bill through a third party not a shareholder, in contravention of the Bank Acts.

II. RELATIVE TO CALLS.

STRATFORD RAILWAY COMPANY *v.* STRATTON, T. T. 1831. K. B. 2 *B. & Ad.* 519.

THE committee of a joint-stock company were only empowered to make calls "as they should from time to time find necessary," at certain intervals of three calendar months—

The Court held, that an order at one time for several calls, although not to be paid but at stipulated intervals, was irregular; and that a subsequent act, dispensing with a condition in the first act, that the powers should not be exercised until the subscription was completed, did not give validity to calls irregularly made before it passed, and that the calls being contrary to law, it was competent to the defendant to take the objection, although he was a party to their being made.

Authority to make calls from time to time does not authorize several calls being made at one time*.

SOUTHAMPTON DOCK COMPANY *v.* RICHARDS, E. T. 1840. C. P. 1 *Scott, N. S.* 219; S. C. 1 *M. & G.* 448.

IN an action for calls—

The Court held, 1st, that the book in which the proprietors' names were registered, kept by the secretary, was properly admitted to prove the defendant a proprietor; 2ndly, that the calls were pro-

The minute-book need not be signed by the chairman at the time of the

* Where the act establishing a joint-stock company, declared that a certain sum should be subscribed before any of the powers, &c. should be put in force:—Held, that such sum being incomplete at the time of making the call, no action could be maintained for such call, and that it was not sufficient that the subscription list was complete before the action commenced. (*Norwich and Lowestoff Navigation* v. *Theobald*, H. T. 1828, N. P., 1 M. & M. 151).

making the calls; and the book is evidence of a proprietor being a member.

perly made, although the minute-book was not signed by the chairman, at the very time of the meeting, but afterwards; and, lastly, that, the act giving the action of debt to recover such calls, interest might be properly given as damages for the detention of the debt.

CROMFORD RAILWAY COMPANY *v.* LACEY, H. T. 1829. Ex. 3 *Y. & J.* 80.

And a party whose name is inserted in the statute cannot, in an action for calls, object to an untrue recital in the act.

IN an action for calls, after the requisite forms of the act had been complied with, against a party whose name had been inserted in the act as an original proprietor, and who had subsequently acted as such, it appeared that the statute recited that a sum of money had been subscribed by the proprietors, under a contract binding their heirs, whereas, in fact, that sum had not been subscribed, and no contract under seal had been executed by the proprietors.

The Court held, that a defendant who, with a knowledge of the misrecital, had paid previous calls, and acted as a proprietor, was estopped from questioning the validity of the act, upon the ground of the misrecital; and that it was not incumbent on the plaintiffs to shew that the defendant had executed a contract under seal, in order to prove that he was a proprietor withing the meaning of the act.

III. RELATIVE TO THE RIGHTS AND LIABILITIES OF SHAREHOLDERS.

(*a*) AS REGARDS THEMSELVES.

1. *Where the Company is formed.*

LUCAS *v.* BEACH, E. T. 1840. C. P. 1 *Scott, N. S.* 350; S. C. 1 *M. & G.* 417.

Where a party employed to do work, afterwards became a shareholder, he cannot recover for the work done after that time,

THE plaintiff, having entered into a contract with a joint-stock company for the execution of a certain work at a stated price, afterwards became a shareholder, and certain other work was contracted for—

The Court held, that he could only recover on the first contract.

GODDARD *v.* HODGES, M. T. 1832. Ex. 1 *C. & M.* 33; 3 *Tyrw.* 209.

even though his shares were purchased in the name of another.

THE plaintiff was a solicitor to a bridge company, of which the defendant was a member, and was sued for expenses incurred, and business done by the plaintiff; it appeared that the plaintiff had represented to a party that, as solicitor, he could not hold shares, and had induced him to take shares in his own name for the benefit of the plaintiff, who paid up all calls thereon—

The Court held, 1st, that such party was to be considered the mere agent of the plaintiff, and that it was the same as if the plaintiff's name had been actually on the books as a member, and that he could not maintain the action; and, 2ndly, that part of the demand having accrued before the transaction, and for which the defendant was liable at law, the former payments made by the defendant must be applied to that part of the demand.

TEAGUE *v.* HUBBARD, T. T. 1828. K. B. 8 *B. & C.* 345.

Nor can a member be sued for money had and received on account of the company.

THE plaintiff was a member of a company of persons called "The Cornish Tin Smelting Company;" the defendant was also a member of the company, and he had also acted as agent of the company in selling goods under a commission del credere. In the course of that agency he sold goods to Conners, the acceptor of the bills in question, and drew upon Conners for their amount. In drawing the bills the defendant had written his name thus:—"Zech. Hubbard, for Cornish Tin Smelting Company." But, when he indorsed them to Meares, who was the actuary of the company, he had written merely his name, "Zech. Hubbard." Meares indorsed them as "Actuary for Cornish Tin Smelting Company." It was on account of the company that the plaintiff sued. The plaintiff proved that the defendant had admitted that he had received of Conners, the acceptor, a composition of 10*s.* in the pound on the bills in question on account of the company. This he had received in consequence of his having as agent and joint proprietor of the company executed a power of attorney to sue Conners in America. Upon these facts the plaintiff obtained a verdict for the amount of the composition thus received; leave being reserved to the defendant to move to enter a nonsuit. On motion for that purpose—

The Court held, that, where a person, being the member of a partnership company, receives money on their account, he cannot be sued at law for the same, although he received it in a character distinct from that of his being such a member.

CARDEN *v.* GENERAL CEMETERY COMPANY, H. T. 1839. C. P. 5 *Bing. N. S.* 253; S. C. 7 *D. P. C.* 275; S. C. 7 *Scott*, 97.

But where an act directing the expenses of obtaining it to be paid out of the monies subscribed, the directors are bound so to apply the first they receive, and a member of the company may sue the general body for the amount.

AN act of Parliament for the formation of a Cemetery Company, enacted, that all the money to be raised by a company by virtue of the act should be laid out and applied in the first place in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this act, and all other expenses preparatory or relating thereto, and the remainder of such money shall be applied in and towards purchasing lands, tenements, and hereditaments, and making and maintaining the said cemetery and other works by this act authorized to be made, and in otherwise carrying this act into execution.

The Court held, that the plaintiff was entitled to recover for his labour and expenses incurred and bestowed before the passing of the act, without its appearing that a request had been made to him by any one, and before any privity of contract existed between the party who bestowed his labour, expended his money, &c., and the company. Neither was it a valid objection, that the labour employed and the money expended did not appear to be of value to any body, inasmuch as the declaration contained an allegation, that the labour and the expense were for the purpose of procuring the act under which the defendants were incorporated, and which they subsequently adopted. Held also, that the plaintiff was not confined to an action on the case against the company for a breach of duty in the misapplication of the funds. It was competent to him to seek his remedy by an action of debt.

BEDFORD *v.* BRUTTON, E. T. 1834. C. P. 1 *Bing. N. S.* 399; S. C. 1 *Scott*, 245.

So, a shareholder may sue the directors on a demise of land;

PLAINTIFF and defendants were members of a joint-stock company; plaintiff agreed to demise land to defendants as trustees for the company; defendants covenanted to pay him rent; and, by a separate deed, plaintiff and the other members of the company covenanted to indemnify the defendants for acts done by them as trustees.

The Court held, that plaintiff, notwithstanding he was a member of the company, might sue defendants on their covenants.

LAWRENCE *v.* WYNN, E. T. 1840. Ex. 5 *M. & W.* 355.

or the secretary may sue a shareholder for his proportion in increasing the trading of the company.

A LOCAL act for enabling a company to sue and be sued in the name of their secretary, contained a clause, enacting, that it should not be lawful for the company to increase their capital or extend their works beyond 5000*l.*; otherwise so much of the privileges given by the act, as referred to the power of suing in the name of the secretary, should be void. By a subsequent act, enabling the company to raise a larger sum of money, the above clause was repealed, and the company were empowered at a general meeting to direct that all their debts for the time being should be apportioned among the shareholders, and paid by them at such time and place, to such persons and in such manner as the general meeting should order; and the secretary was authorized to sue the shareholders for such sums or the part thereof remaining unpaid.

The Court held, that an action might be maintained by the secretary against a shareholder for his proportion of debts incurred by the company in extending their works and increasing their capital before the passing of the latter act of Parliament.

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2. *Where the Project is abandoned.*

MILBURN *v.* CODD, M. T. 1827. K. B. 7 *B. & C.* 419; S. C. 1 *M. & Ry.* 238.

Where the project is abandoned, an attorney, a member of a joint-stock company, cannot sue his late co-partners for his costs.

IN an action of assumpsit for work and labour, as an attorney and solicitor, &c., it appeared that the plaintiff had continued a shareholder in a joint-stock company up to the date of its dissolution—

The Court held, that he could not maintain an action for work and labour in the defending of actions commenced subsequently to that dissolution against other shareholders in respect of partnership transactions, although he had been specially employed by those shareholders for that purpose.

WILSON *v.* BUTLER, H. T. 1839. C. P. 4 *Bing. N. S.* 748; S. C. 6 *Scott*, 541.

But, under a covenant on the part of a shareholder to pay his contri-

IN covenant by the trustee of a joint-stock company, the declaration set forth, that the deed executed by the defendant empowered the major part of the committee to decide and to act for the purpose of winding up the concerns of the company, and that the per-

sons, parties to the indenture, should and would contribute and pay in equal shares and proportions all sums of money which might from time to time be required for the payment or satisfaction of all debts, &c.; and that the certificate of the committee, or the major part of the sums and proportions, should be conclusive evidence that the money was required, and of the proportion which each party was to pay. It then alleged, that a certificate had been signed of a certain sum being required and of the portion which the defendant was bound to pay. Issue being joined upon a plea, that the committee had not certified as the fact was, nor was it the fact—

bution towards the liabilities of the company according to a certificate to be granted by a committee, he is not precluded from impeaching such certificates when granted.

The Court held, that, notwithstanding the clause in the deed, the certificate should be conclusive evidence that the money was wanted for the purpose specified, as he himself had, under a former certificate, paid a portion of the sum required, it was not, inasmuch as the plaintiff waived the estoppel and made the truth of the fact the very issue, and which the jury were called on to try:—Held, also, that a certificate, stating that a certain sum was required, was not consistent with a state of facts shewing that a portion of such sum had been paid upon a former occasion under a former certificate; and such inaccuracy was not cured by a subsequent notice that credit would be given for that which had been paid, and that the smaller sum only would be required, inasmuch as the correctness or incorrectness of the certificate would depend upon its contents when it was signed, and would not be affected by any subsequent incident or event.

NOCKELS *v.* CROSBY, H. T. 1825. K. B. 3 *B. & C.* 814; S. C. 5 *D. & R.* 751.

A SCHEME for establishing a tontine was put forth, stating, that the money subscribed was to be laid out at interest, and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project.

Money paid for shares in a projected company, which is afterwards abandoned, may be recovered back without deduction of expenses.

The Court held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expenses incurred.

(*b*) AS REGARDS THIRD PARTIES.

1. *Where the Company is formed.*

EAST LONDON WATERWORKS COMPANY *v.* BAILEY, M. T. 1826. C. P. 4 *Bing.* 283; S. C. 12 *Moore*, 533.

THE statute of incorporation empowered the directors of the company to make contracts, agreements, &c. with workmen and other persons employed on the works of the undertaking.

A joint-stock company must contract by deed.

The Court held, 1st, that it was to be construed only as enabling them to regulate and manage the concerns of the company without the inconvenience of calling all the members together, and not to make

contracts otherwise than corporations usually may, viz. by deed under the corporation seal; 2dly, that they could not maintain assumpsit on an executory contract.

BRANCH *v.* ROBERTS, M. T. 1836. C. P. 3 *Bing. N. S.* 963.

But, if the charter or deed authorize it, a director may accept a bill*.

IN an action by indorsees against acceptors upon a bill of exchange drawn by one Clare, and addressed to "Messrs. G. M. Roberts, James and G. H. Foster, H. Blakesley, and others, Directors of the South Metropolitan Gas Light and Coke Company, No. 3, Crosby-square." The form of the acceptance was, "accepted for self and Directors. E. M. Roberts, Chairman."

The Court held, that the right of one director to accept a bill for himself and the others is not a right implied by law, like that which belongs to one member of an ordinary partnership with respect to bills drawn and accepted for the purposes of their trade; but must depend upon the powers given by the charter, or deed, or agreement under which the company is constituted, or some other agreement that a bill so drawn and accepted shall have that legal effect.

ANDREWS *v.* DALLY, E. T. 1827. C. P. 4 *Bing.* 566; S. C. 1 *M. & P.* 490.

Where a party is to be paid

THIS was an action by an attorney against the clerk to the commissioners named in an act of Parliament, which provided that the

* The City of London Gas Light and Coke Company may maintain assumpsit for gas supplied to the occupiers of a wharf, and it is not necessary in such a case that there should have been any contract by deed executed by the Company. (*Gas Light Company* v. *Nicholls*, T. T. 1826, N. P., 2 C. & P. 365). In an action by the solicitor of an intended company for preparing their copartnership-deed, a person may be liable without being one of the directors. The persons who are directors are liable, and other persons may be liable also, if they interfere in the management, and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers of the solicitor in preparing the deed. (*Bell* v. *Francis*, M. T. 1839, N. P., 9 C. & P. 66). Where the jury found that the defendant was not a member of a joint-stock company when the order for the goods for which the action was brought was given, although they were delivered after his becoming so:—Held, that he could not be made liable for what was supplied on the credit of others. (*Whitehead* v. *Barron*, 1836, N. P., 2 M. & Rob. 248). And where the defendant was not a member of the local committee at the time the plaintiff was first engaged as secretary, but became &c., while the plaintiff continued secretary, it will be for the jury to say, whether the defendant did not continue to employ the plaintiff on the same terms on which he was originally engaged. (*Kerridge* v. *Hesse*, M. T. 1839, N. P., 9 C. & P. 200). So, where the defendants, being four directors of a company, and liable individually on a bill, and being unwilling to make a call, applied to the plaintiff to advance them the amount, which he agreed to do if they would pay his bill for goods supplied to the company:—Held, that it was for the jury to say, whether the advance was made on the credit of the company or of the individual directors, to relieve them from a personal liability. (*Colley* v. *Smith*, 1836, N. P., 2 M. & Rob. 96). A party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, is to be considered as a partner from the time of his paying the deposit. Quære, if the mere payment of the deposit, without the subsequent signature of the deed, would make him a partner. (*Lawler* v. *Kershaw*, T. T. 1827, N. P., 1 M. & M. 93). The directors of a gas company are answerable for an act done by their superintendent and engineer under a general authority to manage works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose discontinued. (*Rex* v. *Medley*, 1835, N. P., 6 C. & P. 292).

expenses of passing that act shall be paid by the commissioners out of the monies then raised or levied under the first act, or out of the monies or funds that shall be raised or levied under the second statute.

out of the first monies, he must shew that sufficient has been received.

Per Cur.—The commissioners cannot be called on to pay until those funds are raised. The plaintiff ought, therefore, to have shewn that there had been a sufficient sum levied by tolls or otherwise to satisfy his demand before he could be entitled to recover.

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2. *Where the Project is abandoned.*

PITCHFORD *v.* DAVIS, E. T. 1839. Ex. 5 *M. & W.* 2.

Where the scheme is abandoned, there is no difference between trading and mining companies as to liability of shareholders.

IN an action for goods sold against members of a joint-stock company, it appeared that the scheme had been abandoned.

The Court said, that there is no distinction between trading and mining companies; and where a party takes shares in a concern, on a prospectus holding out that a certain capital is to be raised for carrying it on, he will not be liable as a partner, unless the terms of the prospectus be fulfilled, or it be shewn that he knows and acquiesces in the directors carrying it on with a less capital; where the jury negatived such knowledge or acquiescence, and found the defendant not liable, the Court held the finding right.

DOUBLEDAY *v.* MUSKETT, M. T. 1830. C. P. 7 *Bing.* 110; S. C. 4 *M. & P.* 750.

Parties having shares attending meetings as directors of a joint-stock company, though not absolutely appointed, are liable*.

ASSUMPSIT for work and labour. In the month of August, 1825, it was proposed to establish a company for the supply of water to the town of ——. The respective defendants consented to become directors of the proposed company, and received the shares allotted to them as such directors, and paid the deposits thereon. On the 17th of September, a meeting of the directors was held at which both the defendants were present, and it was resolved that the work and labour should be done.

The Court held, that where parties have been held out to the world and have acted as directors of a joint-stock company, and have not done any thing to divest themselves of the character of directors, they are liable for contracts entered into on the part of the company, although the contracts be entered into after they have ceased to attend the meetings of the directors.

See 6 *Bing.* 776; 3 *B. & C.* 814.

ELLIS *v.* SCHMŒCK, E. T. 1829. C. P. 5 *Bing.* 521; S. C. 3 *M. & P.* 220.

Parties who have never signed the partnership-deed, and have trans-

THE defendants had been shareholders in a joint-stock mining company, but had parted with their shares. They had attended meetings of the company, but had not signed the deed of trust by which the affairs of the company were to be regulated. In an ac-

* A party, who originally invited the defendant and others to form a joint-stock company, acting himself as secretary to the committee, the scheme never taking effect, cannot maintain an action for compensation for services; semble, it might have been otherwise if they had sent for and employed him to assist them. (*Parkin* v. *Fry*, T. T. 1826, N. P., 2 C. & P. 311).

ferred their scrip before action, may nevertheless be sued for debts of the company if they have attended meetings.

tion for goods furnished to the company, it was objected for the defendants, that as they had not signed the deed, but had transferred their shares, and thus ceased to be shareholders previously to the commencement of the action, they could not be liable to the plaintiff. The case of *Lawler* v. *Kershaw,* (1 Mood. & M. 95), was cited, where the defendant had executed the deed.

Gaselee, J., gave no opinion as to whether or not the defendants were partners in the company. The jury found that the defendants formed part of the company, and that the company originated in fraud, but acquitted both plaintiff and defendants of any participation in the fraud, and they returned a general verdict for the plaintiff for the whole of his demand. On motion for a nonsuit—

The Court refused to interfere.

IV. RELATIVE TO THE DIRECTORS, AND MEETINGS CONNECTED WITH.

MOORE *v.* HAMMOND, E. T. 1827. K. B. 6 *B. & C.* 456.

The directors might meet weekly:—Held, that to constitute a good meeting, the day and hour should be fixed*.

IT was provided, by the deed of settlement of a joint-stock company, that the directors should meet weekly at the office of the company, at such day and hour as they should from time to time agree upon.

The Court held, that, although there was no other meeting during the week, one which was not the result of agreement or appointment at a previous meeting was not valid under the deed.

WILSON *v.* WILSON, T. T. 1838. C. P. 6 *Scott,* 540; S. C. 4 *Bing. N. S.* 748.

A director absconding is "an incapacity to act as a member," under the deed.

CERTAIN shareholders of a joint-stock company by deed appointed a committee to do certain acts. The deed contained a proviso, that, in case any member of the committee should die, or decline, or desire to be discharged from acting, or become incapable to act as a member of the committee, the others should have power to nominate another in his stead. One of the committee absconded to America, under circumstances strongly evidencing no intention to return.

The Court held, that he thereby became incapable to act within the meaning of the deed.

V. RELATIVE TO THE OFFICERS OF.

EDGELL *v.* FRANCIS, M. T. 1840. C. P. 1 *Scott, N. S.* 118.

The directors of a joint-stock

THE plaintiff, being secretary of a joint-stock banking company, went with the cashier to the office of a branch bank, and was found

* Proof of annoyance and disturbance by a person present at a meeting, such as crying "hear, hear," and putting questions to a speaker, and making observations on his statements, will not justify the chairman of the meeting in giving such person in charge to the police; but to justify such a course of proceeding, it must be shewn that what was done amounted to a breach of the peace. (*Wooding* v. *Oxley,* E. T. 1839, C. P., 9 C. & P. 1).

by the defendant, one of the directors, removing books, &c., who thereupon gave both into custody, on a charge of felony. In an action of trespass and false imprisonment, the plaintiff gave in evidence that the defendant had, on the following morning, gone to the London house, and broken open the plaintiff's desk, and taken away papers, which the Judge received, as shewing malicious motives throughout the transaction. The plaintiff had a verdict. On motion for a new trial, on the ground that evidence was inadmissible for the purpose of shewing the animus with which the defendant acted and the feelings by which he was influenced—

The Court refused to interfere.

company finding the secretary removing books, &c., cannot give him in charge for felony.

VAUGHAN *v.* BRINE, M. T. 1840. C. P. 1 *M. & G.* 359; S. C. 1 *Scott, N. S.* 258.—S. P. LUCAS *v.* BEACH, M. T. 1840. 1 *Scott, N. S.* 350.

THE defendants, the provisional committee of an incorporated company, signed an undertaking to appoint the plaintiff the secretary, at a certain salary, which was duly stamped.

The Court held, that a subsequent resolution, made and signed by the defendants, appointing the plaintiff to such office, he not being present, &c., and stating the terms of remuneration, &c., was properly admitted as evidence without a stamp, as not being an agreement in itself, but the mere determination of the parties to employ the defendant, which they might have rescinded, and not binding on the plaintiff without his consent thereto.

A resolution by a company, appointing a secretary, need not be stamped.

VI. RELATIVE TO THE TRANSFER OF SHARES.

JACKSON *v.* JACOB, T. T. 1837. T. T. 1837. C. P. 3 *Bing. N. S.* 869.

THE defendant's answer to the plaintiff's demand to transfer shares agreed to be bought, admitted his inability to do so, and requested time to arrange matters.

The Court held, that no tender of the price was necessary; and thought that a tender to the broker employed in the sale would be good.

If the defendant admits his inability to transfer shares, the price need not be tendered.

VII. RELATIVE TO ACTIONS BY AND AGAINST.

(*a*) FORM OF*.

* The Southwark Bridge Company may maintain assumpsit for the use and occupation of premises held under them. (*Southwark Bridge Company* v. *Sells*, T. T. 1826, N. P., 2 C. & P. 371). So, where the directors of a company granted a lease, with a power of re-entry, and afterwards the company was incorporated by an act of Parliament, which (amongst other things) enacted, "that all contracts, &c., theretofore entered into with the directors of the company shall be as valid and as effectual to all intents and purposes as if the company had been incorporated when the same contracts, &c., were entered into, and as if the same had been entered into with the incorporated company:"—Held, that the incorporated company might support ejectment on the clause of re-entry. (*Doe* d.

(*b*) Parties to*.

BROWN *v.* TAPSCOTT, H. T. 1840. Ex. 6 *M. & W.* 119.

A member of a company, authorized by agreement to do a particular thing, may maintain special assumpsit.

IN assumpsit, it appeared that several members of a company of proprietors of a steam-boat, running during the summer months, by a memorandum, signed by the plaintiff, defendant and others, authorized the plaintiff to charter a boat, and make arrangements for its running during the winter months, "on our joint account," each taking a portion of the profits proportionate to the amount of their subscriptions, and undertaking to pay their instalments by a certain time.

The Court held, that although an action for money paid might not lie for the instalments payable by the defendant, advanced by the plaintiff, yet that a special assumpsit would lie for non-performance of the undertaking, founded on the consideration of the plaintiff's undertaking the management, and a promise to pay, that would be sufficient evidence to support the count on an account stated, and the rule for a nonsuit was discharged.

(*c*) Declaration.

TILSON *v.* WARWICK GAS COMPANY, M. T. 1825. K. B. 4 *B. & C.* 962; S. C. 6 *D. & Ry.* 376.

A count, that the company retained the plaintiff to obtain the statute, and that the statute was obtained, and that the expenses were to be paid out of the first money, and that large sums had been received, is sufficient†.

IN an action of debt against an incorporated gas company, the first count stated the retainer of the plaintiff to obtain the act; that it was obtained; and thereby provided, that the costs of obtaining the act should be paid out of the first monies subscribed, and that large funds had been subscribed.

The Court held, that the count stating all facts necessary to constitute a debt, the plaintiff was entitled to recover thereon, notwithstanding no allegation that the defendants agreed to pay the money; and that, upon general demurrer, if it were necessary that such contract should be by deed, it would be intended that there was such a deed.

GALLOWAY *v.* BLEADEN, M. T. 1840. C. P. 1 *Scott, N. S.* 171.

After verdict, the Court allowed a declaration to be amended.

IN an action brought against the secretary of an incorporated company, for the infringement of a patent by the latter—

The Court, after a verdict, with nominal damages, reluctantly, on payment of costs, and adding the costs of the trial, allowed

London Dock Co. v. *Knebell*, 2 M. & Rob. 66). Where the members of an incorporated company had, by their superintendent acting under the orders of the solicitor to the company, detained goods, and which were afterwards demanded by a note addressed to the directors, who refused to deliver them up:—Held, that trover might be supported against the company. (*Duncan* v. *Surrey Canal Company*, 1820, N. P., 3 Stark. 50).

* See, also, 1 & 2 Vict. c. 96.

† In an action by a banking copartnership in the name of one of its public officers:—Held, that it was sufficient to describe him as duly appointed such officer, without going on to aver compliance with the requisites of 7 Geo. 4, c. 46, s. 4. (*Spiller* v. *Johnson*, E. T. 1839, Ex., 8 D. P. C. 368; S. C., 6 M. & W. 570).

the plaintiff to amend his declaration, by introducing an averment that the company was incorporated, and a proper description of the defendant, as the registered officer, according to the statute.

(*d*) Pleas.

HILL *v.* MANCHESTER AND SALFORD WATERWORKS, M. T. 1833. K. B. 2 *N. & M.* 573; S. C. 5 *B. & Ad.* 866.

Under the plea of non est factum, a company may shew that a bond was not executed in accordance with the statute*.

AN act of Parliament, constituting a company a corporation, required that certain notices should be given, and a certain number of persons should be present at a special general meeting; and it was alleged that such notice had not been given, and such number of persons were not present at the meeting, when a bond to the plaintiff was executed.

The Court held, that, on a plea of non est factum, the company might give in evidence such matters as shewed a non-compliance with the provisions of the statute in that respect, although their corporate seal had been affixed to the bond by the proper officer.

(*e*) Inspection of books, &c.

IMPERIAL GAS COMPANY *v.* CLARKE, M. T. 1830. C. P. 4 *M. & P.* 727; S. C. 7 *Bing.* 95.

To grant inspection of the books, &c., it must appear material to the defence.

IN an action against the directors of a joint-stock company for incapacity and negligence—

The Court refused a rule for the inspection of books, it not appearing from the affidavit that such inspection was material or necessary to the defence.

(*f*) Evidence.

HEYSHAM *v.* FORSTER, M. T. 1829. K. B. 5 *M. & Ry.* 277.

To make entries in the books evidence, the meeting must have been convened according to the act of Parliament,

A LOCAL act authorized acts to be done at meetings to be called for that purpose, and directed that entries in the commissioner's books should be evidence.

The Court held, that entries, stating orders to have been made at a meeting held by public notice, without shewing that notice was given of the purpose for which it was called, was not sufficient to establish the legality of the meeting.

SOUTHAMPTON DOCK COMPANY *v.* RICHARDS, M. T. 1840. C. P. 1 *Scott, N. S.* 219.

unless the clause in the

BY the 84th section of the act of incorporation of the Southampton Dock Company, it is enacted, amongst other things, that in an

* In an action against the officer of an incorporated company, the Court refused to allow a plea that the defendant was not such officer, without an affidavit, it being in fact a plea in abatement. (*Wood* v. *Marston*, M. T. 1839, Ex., 7 D. P. C. 865).

statute be directory only.

action against a shareholder for calls "in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the company is by the act directed to enter, and keep a list of the names and addresses and places of abode of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, shall be primâ facie evidence that such defendant is a proprietor, and of the number or amount of his shares therein;" and by sect. 89, the company are required "from time to time to cause the names and additions and places of abode of the several persons who shall be from time to time respectively entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to hold, and the amount of the subscriptions paid thereon, and also the proper number by which every such share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the secretary of the said company."

The Court held this latter clause was directory only, and that a failure literally to comply with the directions as to the mode of making the entries, an omission to insert the numbers of the shares or the addresses of some of the proprietors, did not render the book inadmissible in evidence; held also, that it was not necessary that the entries should be made by the hands of the secretary.

HILL *v.* MANCHESTER AND SALFORD WATERWORKS COMPANY, M. T. 1833. K. B. 2 *N. & M.* 573; S. C. 5 *B. & Ad.* 866.

But entries are not evidence for the company as against a stranger*.

A COMPANY, by their statute of incorporation, were required to keep books for the inspection of every member.

The Court held, that those books were not evidence for the company against a stranger, in order to prove that the provisions of the act had not been complied with in convening the meeting at which the bond was executed. The principle upon which partnership books are evidence against all the partners is, that they are kept by themselves or by their servants under their authority; and therefore, as the clerk of the company, when once appointed, is under the control of no individual member, a proprietor entering into a contract with the company is to be deemed a stranger, and cannot be affected by any entry made under the order of the whole body.

* In an action by the solicitor of an intended company for preparing their copartnership deed, a person may be liable without being one of the directors. The persons who are directors are liable, and other persons may be liable also, if they interfere in the management, and hold themselves out as persons giving the order; and in such a case the question will be, whether such persons as were not directors so acted as to become employers in preparing the deed. (*Bell* v. *Francis*, M. T. 1839, N. P., 9 C. & P. 66). By the Cheltenham and Great Western Union Railway Act (6 Will. 4, c. 77), it is enacted, "that, in an action for calls on shares in that company, the book of sales, under the seal of the company, shall be primâ facie evidence that a party is proprietor of shares." It appeared that a call was made in October, 1836, and that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but that the seal was not affixed to it till November, 1836:—Held, that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836. (*Cheltenham and Gloucester Railway Company* v. *Price*, M. T. 1839, N. P., 9 C. & P. 55).

HARVEY *v.* KAY, H. T. 1829. K. B. 9 *B. & C.* 356.

In an action by a member of a joint-stock company against a co-partner slight evidence is sufficient to connect the plaintiff so as to defeat his action.

BY the rules of the company upon the transfer of the shares, the party transferring ceased to be a proprietor from the time the transfer was registered, and the person purchasing was not to be deemed a proprietor until he executed the deed. Upon a plea, in an action against the company, that the promises, if any, were made jointly with one of the plaintiffs, a co-proprietor—

The Court held, that, there being evidence by the letters of the plaintiff that he was a shareholder, although there was no actual proof of his having executed the deed (it having been done under a power of attorney not produced), and there had been no transfer of his shares, he had not relieved himself from his liability as a partner.

PHELPS *v.* LYLE, E. T. 1839. Q. B. 10 *Ad. & E.* 113; S. C. 2 *P. & D.* 314.

Where the directors of a company omitted to join a member because he had become bankrupt:—Held, that the deed of trust must be produced to shew he was no longer a member.

IN an action by directors of a joint-stock company, it appeared that, at the time of the transaction, there were seven acting directors, two of whom had since died, and one, a Mr. Chance, had become bankrupt; but that the action was only by four of the number, Mr. Chance not being made a plaintiff on the record. At the trial, the deed constituting the company was not produced.

Per Cur.—The deed ought to have been produced. The character of directors being that which the plaintiffs assumed, they must shew themselves entitled to bear it. That can only be done by resorting to the deed itself. What is the deed? The form of the company itself is what the deed makes it. On its terms, too, the character of the persons claiming to be directors, and the extent of their powers, must depend; and we must see clearly that the directors, in making the contract, acted according to those powers, and that the powers of the bankrupt director were distinctly put an end to by his bankruptcy, before we can say that the present plaintiffs are right in bringing this action.

(*g*) WITNESSES.

HALL *v.* CURZON, T. T. 1829. K. B. 9 *B. & C.* 646.

In an action against a member of a company, a shareholder is a competent witness for the plaintiff*;

ASSUMPSIT for work and labour against the defendants as members of the "City of London Central Street and Northern Improvement Company." To prove that the defendant was a member of the company, the plaintiff called a shareholder and director of the company; and he was proved to be a shareholder, not only by his

* A butcher sued three of the directors of a zoological society for goods supplied for the animals. For the defence, a witness was called to prove that the plaintiff was a shareholder in the society. The witness was himself a shareholder, and had been released by one of the defendants:—Held, that the witness was not competent without being released by all the three defendants, but that he need not be released by the other shareholders. (*Betts* v. *Jones*, M. T. 1839, N. P., 9 C. & P. 199). A member of a society undertaking to contribute towards all law expenses respecting it:—Held, a competent witness in an action brought against the secretary for a libel, but if the agreement were to contribute towards bearing each other harmless in doing wrong, it would be void. (*Humphreys* v. *Miller*, T. T. 1829, N. P., 4 C. & P. 7).

own admission of the fact, but by other evidence in the cause. The defendant's counsel contended, that he was incompetent, on the ground that he had an interest in fixing the defendant as a co-partner, inasmuch as he would be liable to contribute in a certain proportion, and the witness's contribution would pro tanto be diminished. Lord *Tenterden* overruled the objection, subject to which a verdict was found for the plaintiff.

And the Court refused to interfere.

BECKETT *v.* WOOD, M. T. 1840. C. P. 6 *Bing. N. S.* 380.

and a member of a committee intending to establish a joint-stock company, in an action for work and labour against another member, is a competent witness, if released.

THIS was an action against the defendant, who was one of the provisional committee of the Middlesex Joint-Stock Bank, for wages claimed by the plaintiff in respect of his services as secretary. At the trial, a witness of the name of Nicholson was called for the defendant; and it being shewn, on the examination on the voir dire, that he was a co-contractor with the defendant, his testimony was objected to. A release from the defendant was then tendered, but the objection was renewed, and the witness was rejected.

Per Cur.—We have considered the objection, and are of opinion, on the authority of *Jones* v. *Pritchard*, (2 M. & W. 199), it ought not to prevail, and that no other joint contractor could, in the event of a verdict for the plaintiff, call on the witness for contribution.

(*h*) JUDGMENT.

WILLIAMS *v.* ASPINALL, M. T. 1839. C. P. 7 *Scott*, 822.

On a judgment against the public officer, it was a question whether, to fix the company, it should be by suggestion or sci. fa.;

IN this case judgment had been obtained, in an action against the public officer of a joint-stock company or partnership. On the question, whether the individual partners were to be rendered liable, by a suggestion on the record, under 7 Geo. 4, c. 46, or by scire facias—

The Court gave no decided opinion.

CROSS *v.* LAW, T. T. 1840. Ex. 8 *D. P. C.* 789; S. C. 6 *M. & W.* 217.

but it has since been decided that, after judgment against the public officer, the mode of rendering the company liable is by sci. fa.

THE stat. 7 Geo. 4, c. 46, ss. 12 and 13, for regulating banking co-partnerships in England, enacts, "That every judgment obtained against the public officer of the co-partnership shall operate against the property of the co-partnership, and of every member; and that execution on any such judgment shall and may be issued against any member for the time being; and in case of such execution proving ineffectual, the parties obtaining such judgment may issue execution against any person who was a member at the time the contracts were entered into, or had become a member before such contracts were executed, or was a member at the time of the judgment obtained; provided that no such execution as last-mentioned shall issue without leave first granted, on motion in open court." The plaintiffs having recovered judgment against the public officer of the co-partnership, obtained a rule calling on the members for the time being, and those who had become such both before and after

judgment, to shew cause why a suggestion for damages and costs should not be entered on the record, and why execution should not issue thereon.

The Court held, that, where a party who has obtained judgment against a public officer wishes to proceed against the members for the time being of such co-partnership, the proper course is by scire facias, and not by a suggestion on the record; and that, if he wishes to take out execution against those who were members at the time of the contract, he is still bound to proceed by scire facias, but must first obtain the leave of the Court.

BOSANQUET *v.* RANSFORD, H. T. 1840. Q. B. 3 *P. & D.* 298.

AN action had been brought, and judgment obtained, against a public officer, as the nominal defendant, and the plaintiff wished to introduce some of the members of the co-partnership upon the record, for the purpose of issuing execution against them.

The Court held, that the proper mode of proceeding was not by entering a suggestion upon the roll of the fact of their being co-partners, but by scire facias, as it was the introduction of new parties upon the record.

And the Queen's Bench

WHITTENBURY *v.* LANE, M. T. 1839. C. P. 6 *Bing. N. S.* 345; S. C. 8 *Scott*, 661.

IN this case the Court held, that the course of proceeding on a judgment, obtained against the public officer of a joint-stock company, to obtain judgment against a partner not named on the record, is only by scire facias.

and C. P. entertain the same opinion.

HARRISON *v.* PIMMINS, H. T. 1839. Ex. 4 *M. & W.* 510; S. C. 7 *D. P. C.* 28.

BY the provisions of 4 & 5 Will. 4, c. 69, and 1 Vict. c. 88, a director of the Cork Mining Company was sued, and judgment recovered against him, in an action for a debt of the company. On a rule to shew cause why the defendant should not pay the amount of damages and costs recovered, or why the plaintiff should not be at liberty to sue out execution against him upon the said judgment—

Per Cur.—The defendant is a nominal defendant only; he continues so though he should resign, be removed, or disqualified, and so totally disconnected with the company; his name would still be used, though he should die; and as the action is to be brought against a director at the time the suit is instituted, he may be a person who was a perfect stranger to the company when the cause of action accrued. We cannot suppose, therefore, that the legislature meant such a defendant to be *personally* liable.

On a verdict against a nominal defendant, in a suit against a public company, where the property of the latter is seizable, he is not personally liable;

BARTLETT *v.* PENTLAND, H. T. 1831. K. B. 1 *B. & Ad.* 704.

AN act of Parliament, creating a public company, declared that they might be sued in the name of their secretary, and that, judgment being obtained against him, any member of the company should be liable to execution.

and execution issued against members of a company, where

judgment obtained against the secretary, irregular, without their being made a party to the record.

The Court held, that under such a judgment the plaintiff was not authorized to sue out an execution against a person whom he contended to be (and who, in fact, might be) a member of the company, without first applying to the Court for leave to enter the special facts on the roll, in order to give the defendant an opportunity of traversing or demurring to them.

VIII. RELATIVE TO JOINT-STOCK COMPANIES IN IRELAND.

HUGHES *v.* THORPE, H. T. 1840. Ex. 5 *M. & W.* 656.

Under the 6 Geo. 4, c. 42, in an action on a contract, it must appear that the bank was in existence at the time of the contract.

BY the 10th sect. of the 6 Geo. 4, c. 42, (the Act for the better Regulation of Co-partnerships of certain Bankers in Ireland), it is enacted, that "All proceedings at law or in equity, to be commenced for or on behalf of any such co-partnership against any person or persons, whether members of such co-partnership or otherwise, for recovering any debts, &c., shall, from the passing of this act, be commenced and prosecuted in the name of any one of the public officers, &c., of the said co-partnership." To an action by the Agricultural and Commercial Bank of Ireland, the defendant pleaded, "that the company consisted of more than six persons, and was established after the passing of the 6 Geo. 4, c. 42; that the establishments, or houses of business of the said co-partnership, had been, from the time of the formation thereof until the commencement of this suit, and then were, at places in Ireland less than fifty miles from Dublin."

The Court held, that, in order to prove the plea, the defendant must shew the existence of a branch bank during the whole time; also, that the existence at any time of such an establishment within the fifty miles would be no defence to the action: it must be shewn to exist at the time the contract was made, or at the commencement of the action.

Judge*.

A Judge at chambers may dispose of matters arising out of any court.

BY 1 & 2 Vict., c. 45, it is enacted, "That every Judge of the Courts of Queen's Bench, Common Pleas, or Exchequer, shall have equal jurisdiction, power, and authority to transact out of Court such business as may according to the course and practice of the

* Semble, that a Judge of a Court of Record has not individually any power to fine or imprison for a contempt. (*Rex* v. *Faulkner*, T. T. 1835, Ex., 2 C., M. & R. 525; S. C. 1 Gale, 210). A witness, in a prosecution tried at the King's Bench sittings, struck the defendant after the trial was over, as both were in the lobby of the Court. The witness being brought into Court in custody, and evidence given of these facts, the Judge committed him to the custody of the Marshal for three days for this contempt of Court. (*Rex* v. *Wigley*, H. T. 1835, N. P., 7 C. & P. 4).

A Judge at chambers has jurisdiction to fix the amount of costs to be paid, as the condition of making an order. (*Collins* v. *Aaron*, 6 Dowl. P. C. 423; 4 Bing. N. S. 233; 5 Scott, 595). The swearing of an affidavit of debt is "a business depending in court," within the 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, over which by that statute the Judges of all the Courts have a jurisdiction in common. (*Griffin* v. *Taylor*, E. T. 1838, C. P., 6 Dowl. P. C. 620; 4 Bing. N. C. 369; 6 Scott, 141). A

Court be so transacted by a single Judge relating to any suit or proceeding in either of the said Courts of Queen's Bench or Common Pleas, or on the common-law or revenue side of the said Court of Exchequer, or relating to the granting writs of certiorari or habeas corpus, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to her Majesty, or relating to any other matter or thing usually transacted out of Court, although the said Courts have no common jurisdiction therein, in like manner as if the Judge transacting such business had been a Judge of the Court to which the same by law belongs."

PIKE *v.* DAVIS, T. T. 1840. Ex. 8 *D. P. C.* 387; S. C. 6 *M. & W.* 546.

If a Judge at chambers refuses to interfere, application may be made to the Court.

THIS was a rule calling on the plaintiff to shew cause why a writ of execution which had been issued against the defendant should not be set aside with costs. The ground was, that nothing was due from the defendant to the plaintiff. The case had been heard on affidavit before *Gurney*, B., at chambers, who had dismissed it on the merits, with costs.

Per Cur.—A party is at liberty to apply to the Court to set aside a Judge's order, why then should he be prevented from applying to the Court where the Judge refuses to make an order; and, if he does so, there is nothing that precludes him from adding fresh facts upon affidavits.

REX *v.* SHERIFF OF DEVON, E. T. 1833. K. B. 2 *Ad. & E.* 296.

But, the Court will not re-hear a case decided in the Bail Court,

IN this case the Judge presiding in the Bail Court had given his decision. On motion to reverse that decision and re-hear the matter decided on—

The Court refused to interfere or rehear the case again.

RUSSEL *v.* HARTLEY, E. T. 1837. K. B. 7 *Ad. & E.* 522, *n.*

even on fresh affidavits.

A CASE had been disposed of in the Bail Court. On motion to the full Court to re-hear the matter—

Per Cur.—We will not allow a second application in full court, although on fresh affidavits disclosing new facts.

GOREN *v.* TUTE, M. T. 1840. Ex. 7 *M. & W.* 142.

What passes before a Judge at chambers must be brought before the Court by affidavit.

ON motion to set aside proceedings for irregularity, it was not shewn in the affidavits but stated in argument and verified by the recollection of *Gurney*, B., that an application with reference to the present proceeding had been made to him at chambers.

Per Cur.—The fact of a previous application having been made to a Judge ought to be shewn by affidavit, and if any order has been made by him it will speak for itself. It is not expedient that motions of this kind should depend upon a Judge's recollection of what takes place before him at chambers.

Judge, therefore, of one Court has the power to order an arrest of a party although the affidavit was sworn and the writ was afterwards issued out of another Court. (*Ib.*) An action will not lie against the Lord Chancellor for committing a party. (*Dicas* v. *Lord Brougham*, M. T. 1833, N. P., 6 C. & P. 249; see *Mostyn* v. *Fabrigas*, Cowp. 172; *Milward* v. *Thatcher*, 2 T. R. 87).

ATKINS *v.* DRAKE, H. T. 1825. Ex. 1 *M. & Y.* 213.

One Judge being absent is no ground for re-arguing a case.

ON the trial of an issue, whether a modus of 5*s.* was payable for all the hay within a subdivision of a parish, the occupier's case was proved by parol testimony of usage, reputation, and tradition, carried back above a century, by receipts, (the last however not inconsistent with the opposite case), and by collateral circumstances, but was met by the ecclesiastical survey, which valued the tithe hay of the whole parish at only 3*s.*, the parliamentary survey, which made no mention of the modus, (nor of another modus which was taken as confessed against the clergyman), and by nine terriers from 1727 to 1809, which described the modus thus: "in S." (the district), "only 5*s.* for all the hay in their crofts, and nothing paid for all other hay except herbage." The jury found, that the payment had been immemorial and general over all the lands, but *Alexander*, C. B., certified, "that he should have been better satisfied had the verdict confined the modus to the ancient crofts."

The Court was satisfied with the verdict, and therefore refused a new trial. *Hullock*, B., dissenting, and *Garrow*, B., who had not heard the whole of the argument, giving no opinion, an application to have the rule re-argued for the purpose of having the opinion of the whole Court was refused, being new and of a dangerous precedent, particularly as regards the mode of transacting a great part of the common-law business of the Court.

Judge's Order*.

JOHNSON *v.* KENNEDY, M. T. 1835. C. P. 4 *D. P. C.* 345; S. C. 2 *Scott*, 410.

One Judge will not set aside the order of another;

IN this case—

Parke, J., said, whenever an application is made to me at chambers to rescind the order of another Judge, I always refuse it. The proper course is to apply to the Court.

JONES *v.* CORRY, H. T. 1839. C. P. 7 *D. P. C.* 299; S. C. 6 *Bing. N. S.* 247.

and the Court will not set aside

THE plaintiffs sued as executors for work done by their testator, and in a second action for work done by them, both actions being

* By R. T. T. 1 Will. 4, "It shall not be necessary to issue more than two summonses for attendance before a Judge upon the same matter, and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary."

The Court will not judicially notice the stamp upon a copy of a Judge's order, it not being the seal of the Court, but the mark of the Judge's clerk. (*Barrett Navigation Company* v. *Shower*, H. T. 1840, Ex., 8 D. P. C. 173). A summons, bearing date the day of the month, is good, though the year is improperly described, or altogether omitted. (*Soloman* v. *Nainby*, 7 Dowl. P. C. 459). An order nisi at chambers makes itself absolute; therefore, if the party obtaining it does not attend in support of it, the party shewing cause should go before the Judge, and apply to have it discharged, otherwise it will become absolute. (*Humphreys* v. *Jones*, E. T. 1840, Ex., 8 Dowl. P. C. 408; 6 M. & W. 418).

referred, and the award being set aside, when, it being discovered that the action was not tenable, they obtained a Judge's order to amend the particulars in the first action by adding items, which were a portion of the second claim, to secure them for all the work done in the lifetime of the testator.

a Judge's order to amend*.

The Court refused to set aside the order.

MACDOUGALL *v.* NICHOLLS, T. T. 1835. K. B. 5 *N. & M.* 367.

ON a rule, calling on the plaintiff to shew cause why he should not draw up an order, made by *Coleridge*, J., at chambers, or why he should not produce to the Judge's clerk the original summons, with the Judge's minute indorsed thereon, that the plaintiff might draw it up; or why, in case he should not produce such original summons, the plaintiff should not be at liberty to draw up the order from the minutes indorsed on his counsel's brief.

A party obtaining a Judge's order is not bound to draw it up, but his adversary may obtain an order for leave to draw it up†.

The Court said, a party is not bound to draw up an order in pursuance of the Judge's minutes, indorsed upon the summons; and if the opposite party considers it in his favour, he may take out a summons to obtain such order; if by consent the parties submit a matter not within the summons, the party in whose favour made, may draw up the order.

CHARGE *v.* FARHALL, M. T. 1835. K. B. 4 *B. & C.* 865; S. C. 6 *D. & R.* 422.—S. P. KENNY *v.* HUTCHISON, H. T. 1840. Ex. 8 *D. P. C.* 171.

IN an action on a promissory note, a Judge's order had been obtained for staying the proceedings until the plaintiffs should permit the defendant's agent to inspect and take a copy of the note, the defendant admitting his signature to the note, and undertaking not to make any objection to the stamp, the defendant's agent did not draw up the order on the day on which it was obtained, but took time to consult his client in the country.

But if he intends to use it, it should be drawn up and served forthwith.

Per Cur.—A Judge's order must be drawn up and served forthwith, or it must be considered as waived by the party by whom it has been obtained.

REX *v.* PRICE, M. T. 1833. Ex. 2 *C. & M.* 212; S. C. 2 *D. P. C.* 233; S. C. 4 *Tryw.* 60.

ON the 22nd of July, 1833, a Judge at chambers made an order, directing the defendants, who were attornies, to deliver a particular of all sums received by them on account of their client. This order

To ground an attachment a Judge's order, made in vaca-

* In an action for work and labour, a Judge may make an order to allow witnesses to inspect the defendant's premises. (*Turquand* v. *Strand Union Guardians*, H. T. 1840, Ex., 8 D. P. C. 201).

† Where an order for particulars was obtained and served, and the defendant afterwards, and before any particulars were delivered, served a demand of declaration, at the bottom of which was a notice, that he had abandoned his order for particulars:—Held, that this was irregular, and that he ought to have got rid of the order for particulars before the demand of the declaration; and the Court set aside a judgment of non pros, which had been signed for want of a declaration. A plaintiff who obtained an order to be at liberty to amend his writ, is not obliged to draw it up; and if he gives notice of abandoning the order and the writ, and the defendant afterwards appears, a judgment of non pros for not declaring is irregular. (*Solly* v. *Richardson*, T. T. 1838, B. C., 6 Dowl. P. C. 774).

tion, cannot be made a rule of Court as of the preceding term.

was made a rule of Court in August; but the rule was dated as of the last day of Trinity Term. On motion for an attachment—

Per Cur.—We have submitted this point to all the Judges, and they are of opinion that there is such an incongruity apparent upon the face of the proceedings, in attaching a party upon a rule of Court of June, upon an order not made till July, that such practice, if it prevails, ought to be discontinued. The order may be made a rule of Court of the succeeding term.

Judgment in Civil Proceedings.

See also particular titles, according to the form of action and subject-matter.

I. RELATIVE TO JUDGMENT FOR THE PLAINTIFF.

(*a*) In abatement. See, ante, tit. *Abatement.*

(*b*) In bar.

1. *By Default,* p. 409.
2. *By Confession.* See tits. *Cognovit—Warrant of Attorney.*
3. *Of Nonsuit.* See post, tit. *Nonsuit.*
4. *On Demurrer.* See ante, tit. *Demurrer.*
5. *After Verdict.* See post, tit. *Verdict.*
6. *Non obstante veredicto.* See tit. *Non obstante veredicto.*

II. RELATIVE TO JUDGMENT FOR DEFENDANT.

(*a*) In abatement. See ante, tit. *Abatement.*

(*b*) In bar.

1. *As in case of Nonsuit.* See post, tit. *Nonsuit, judgment as in case of.*
2. *Of Nonpros.* See post, tit. *Nonpros.*
3. *On Demurrer.* See ante, tit. *Demurrer.*
4. *Of Nul tiel Record.* See post, tit. *Nul tiel Record.*
5. *After Verdict.* See post, tit. *Verdict.*

III. RELATIVE TO THE SIGNING OF, p. 410.

IV. RELATIVE TO ATTACHING PROPERTY UNDER 1 & 2 Vict. c. 110, p. 411.

V. RELATIVE TO JUDGMENT ON THE WHOLE RECORD, p. 411.

VI. RELATIVE TO STAYING PROCEEDINGS ON, AND SETTING ASIDE, p. 412.

VII. RELATIVE TO THE ARRESTING OF, p. 413.

VIII. RELATIVE TO THE RELATION OF, p. 415.

IX. RELATIVE TO THE DOCKETTING OF, p. 415.

X. RELATIVE TO THE AMENDING OF AND SIGNING IN CASE OF AMENDMENT, p. 416.

XI. RELATIVE TO THE WITHDRAWING OF, p. 417.

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XIV. RELATIVE TO SCIRE FACIAS ON, p. 418.

XV. RELATIVE TO WHAT IS A SATISFACTION, AND OF THE ENTRY ON THE ROLL, p. 419.

XVI. RELATIVE TO JUDGMENTS IN INFERIOR COURTS, p. 420.

XVII. RELATIVE TO IRISH AND SCOTCH JUDGMENTS, p. 421.

XVIII. RELATIVE TO FOREIGN JUDGMENTS, p. 422.

XIX. RELATIVE TO WRIT OF FALSE JUDGMENT, p. 423.

I. RELATIVE TO JUDGMENT FOR THE PLAINTIFF.

(*b*) In bar.

1. *By Default.*

Classey *v.* Drayton, H. T. 1840. Ex. 6 *M. & W.* 17.

An affidavit to set aside judgment by default must shew judgment has been signed*.

On a rule calling upon the plaintiff to shew cause why the interlocutory judgment, signed in this case, should not be set aside for irregularity. The affidavit upon which the rule was obtained (after stating that the action was brought upon a promissory note, and that the defendant had not been served with process or notice of declaration) alleged, "that deponent had been informed and believed that the defendant had been served with a rule nisi to compute

* The application may be made to set aside the judgment for irregularity the day after serving notice of executing a writ of inquiry. (*Amoz* v. *Smith*, M. T. 1839, Ex., 7 D. P. C. 866).

In assumpsit for work, &c., against three, one of whom suffers judgment by default, and the others plead general issues:—Held, that, if the others succeed in shewing that all were not jointly liable, it will prevent the plaintiff from succeeding against any, notwithstanding one has admitted on the record a joint contract. (*Eliot* v. *Morgan*, 1836, N. P., 7 C. & P. 334).

principal and interest on the promissory note; but did not state that interlocutory judgment had been signed.

Per Cur.—The affidavit is defective in not shewing that judgment had been signed, and the rule must be discharged.

III. RELATIVE TO THE SIGNING OF*.

LAMBIRTH *v.* BARRINGTON, T. T. 1835. C. P. 4 *D. P. C.* 126; S. C. 2 *Scott*, 263; 2 *Bing. N. S.* 149.

The Court will not enter a judgment nunc pro tunc, since the 1 & 2 Will. 4, c. 58 (the Interpleader Act);

THE 1 & 2 Will. 4, c. 58, s. 7 (Interpleader Act), enacts, "That all rules, orders, and matters, to be made and done in pursuance of this act, (which rules, orders, &c. have, by the same section, the force and effect of a judgment), may be entered of record, with a note in the margin, expressing the true date of such entry."

The Court will not allow such rules, orders, and matters, &c., to be entered of record nunc pro tunc, though there be no judgment entered up on which the plaintiff can sue out a sci. fa., to enable him to pursue his claim against the executors or representatives of a deceased defendant.

VAUGHAN *v.* WILSON, M. T. 1837. C. P. 6 *D. P. C.* 210; S. C. 4 *Bing. N. S.* 116; S. C. 3 *Scott*, 404.

nor in other cases where delay, even though death has intervened,

BY an agreement between the plaintiff and defendant certain pleas were to be withdrawn, and the former was to sign judgment upon the 6th of June, which he did not do, and the defendant died upon the 8th; and the plaintiff, upon the 17th, took out a summons to enable him to enter the judgment as on the 6th of June. The Court would not allow the judgment to be entered, and rescinded a Judge's order by which such permission was given.

The Court will not allow a judgment to be entered nunc pro

* By 1 Will. 4, s. 3, every judgment so signed may be recorded as the judgment of the Court, though they may not be sitting at the time of signing, and every execution issued by virtue of the act may be tested on the day of issuing thereof, but the Court may stay proceedings, arrest judgment, grant new trial, &c.

Where, by the practice, costs need not be taxed, as upon a cognovit for a given sum, &c., no notice of taxation need be given to entitle the plaintiff to sign judgment. (*Griffiths* v. *Liversedge*, E. T. 1836, B. C., 2 D. P. C. 143). But where a cognovit was given for the debt, payable on a given day, and if not paid the costs to be taxed and judgment signed:—Held, that judgment signed before costs taxed was irregular. (*Wilson* v. *Northern*, T. T. 1835, Ex., 4 D. P. C. 212). It is not necessary to apply for leave to sign judgment upon a Judge's order, under 1 & 2 Vict. c. 110, s. 3; but it seems necessary to demand the costs before execution. (*Wallis* v. *Sheffield*, M. T. 1839, Ex., 7 D. P. C. 793). The fact of the judgment having been signed by an attorney not certificated does not make it irregular, although it may subject the parties to penalties. (*Smith* v. *Wilson*, H. T. 1833, B. C., 1 D. P. C. 545). Where judgment is signed in vacation, pursuant to the 1 Will. 4, c. 7, s. 2, a rule for judgment must, in the Queen's Bench, be given, notwithstanding the provisions of the statute and of 1 Reg. Gen., H. T. 2 Will. 4, s. 67. (*Exeter Governors of Poor* v. *Sivell*, E. T. 1839, B. C., 7 D. P. C. 624). By R. H. T. 2 Will. 4, after the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return, and, after a verdict or nonsuit, on the day after the appearance day of the return of the distringas or habeas corpora, without any rule for judgment. Where the declaration was delivered on the 7th to plead in four days, and on the 10th an order for particulars was obtained, which were delivered on the 13th:—Held, that judgment for want of a plea, signed at ten o'clock on the 15th, was regular. (*Tate* v. *Bodfield*, M. T. 1834, Ex., 3 D. P. C. 218. See, also, post, tit. *Plea*).

tunc, when the non-entry at the proper time did not proceed from the act of the Court, but from the laches of the party himself.

MILLER *v.* SPURRS, H. T. 1833. C. P. 2 *M. & Scott*, 730.

unless the delay be occasioned by the act of the Court.

A VERDICT was taken in Hilary Term, subject to a reference; the award was not made until after the expiration of Trinity Term, previous to which the defendant died.

The Court held, that the award being to be taken as the verdict in substance, and the delay in signing the judgment the consequence of the authority of the Court, with consent of the parties the case was within the spirit of the 17 Car. 2, c. 8, and judgment allowed to be signed as of Trinity Term, nunc pro tunc.

HARRISON *v.* SMITH, H. T. 1829. K. B. 9 *B. & C.* 243.

A judgment signed on a day when the Court does not sit is irregular*.

THE rule to plead was out on Saturday, the 31st of January. Monday, the 2nd of February, was Purification Day. On that day the plaintiff's attorney paid for opening the office, and signed judgment.

The Court held, that a party is not entitled to open the office in order to sign a judgment, or take any other proceeding on a dies non, unless he was entitled to take that proceeding on the previous day.

IV. RELATIVE TO ATTACHING PROPERTY, UNDER 1 & 2 VICT. C. 110†.

V. RELATIVE TO JUDGMENT ON THE WHOLE RECORD.

TURNER *v.* CROSSLEY, M. T. 1833. Ex. 7 *M. & W.* 43.

Where the defendant substantially succeeds, he is entitled to judgment on the whole record.

PLEA, after that of set-off, that the plaintiff ought not *further* to maintain &c., alleging that he was willing and offered to tender, but that the plaintiff dispensed with an actual tender, and the defendant brought the money into Court &c.

The Court held, that it amounted to an informal plea of tender, not a payment into Court; and the plaintiff having taken out the money, and entered a nolle pros., the defendant, having succeeded on the other issues, was entitled to judgment on the whole record.

* Under the 1 Will. 4, c. 7, s. 2, in signing judgment under a certificate for immediate execution, the postea must be framed accordingly. (*Engleheart* v. *Eyre*, T. T. 1833, K. B., 2 D. P. C. 193; S. C. 5 B. & Ad. 78; abridged, ante, tit. *Amendment*).

† The defendant having contracted for the sale of some property, the purchase-money was deposited by the vendee in the hands of a third party, for the use of the defendant:—Held, that this money could not be attached under the 1 & 2 Vict. c. 110, s. 14. (*Robinson* v. *Peace*, M. T. 1833, Ex., 7 D. P. C. 93).

VI. RELATIVE TO STAYING PROCEEDINGS ON, AND SETTING ASIDE*.

YATES *v.* DUBLIN STEAM PACKET COMPANY, E. T. 1840. Ex. 8 *D. P. C.* 402; S. C. 3 *M. & W.* 77.

The Court will not stay a judgment merely because another trial is pending.

UPON the trial of a cause, the defendant having obtained the verdict, the plaintiff moved to stay the judgment and execution on the ground that at the trial of a similar case, which had been withdrawn on account of the verdict in the first, additional evidence, material to the plaintiff's case, would be produced; but the Judge who tried the cause not being dissatisfied with the verdict—

The Court refused the rule.

WENHAM *v.* DOWNES, T. T. 1835. K. B. 5 *N. & M.* 244; S. C. 3 *Ad. & E.* 450.

Upon a judgment set aside with costs as irregularly signed, a Judge may order a stay of proceedings until the costs be paid.

ON motion to rescind an order of *Williams*, J., giving the defendant time to rejoin until three days after the plaintiff should have purged himself of his contempt in non-payment of certain costs. The plaintiff had irregularly signed judgment in this action, and the judgment so signed was set aside with costs. These costs not being duly paid, the above order of *Williams*, J., was made. Subsequently an attachment had issued against the plaintiff for his contempt, but had not been executed.

Per Cur.—No sufficient reason for discharging this order has been shewn to us. If any steps were taken to enforce the remedy by attachment, then the plaintiff may apply.

ROUTLEDGE *v.* GILES, M. T. 1831. Ex. 2 *C. & J.* 163; S. C. 2 *Tyrw.* 169.

A motion to set aside a judgment for want of notice to tax must be made promptly†.

A VERDICT was obtained at the first sittings in Trinity Term, judgment signed on 9th June, and execution issued on the 10th, without any notice given before costs taxed; according to the rule of Michaelmas Term, r. 4, a docket was struck against defendant on the 21st, and commission issued on the 22nd, adjudication on the 24th, and assignees chosen on the 5th of July; on the 6th, a summons was taken out to set aside the proceedings for irregularity, which was attended on the 8th, adjourned until the 12th, and afterwards adjourned with a stay of proceedings until Michaelmas Term, when a rule was moved for; but—

The Court held, that the application was too late.

* Appearing by a person, not an attorney, does not entitle the plaintiff to sign judgment, but only to a rule to set aside the proceedings. (*Basley* v. *Thomson*, M. T. 1833, Ex., 4 Tyrw. 955).

† If a defendant seeks to set aside an interlocutory judgment for irregularity, he must come to the Court within a reasonable time from his knowing that it is signed, and cannot wait until a rule to compute is served. (*Grant* v. *Flower*, 5 Dowl. P. C. 419). Judgment signed on the 23rd, summons to set aside on the 25th, dismissed on the 26th, application to the Court not too late on the 29th. (*King* v. *Myers*, 5 Dowl. P. C. 686). But, where judgment was signed, and notice of inquiry given for the 4th, an application to set it aside for irregularity made on the 12th:—Held, too late. (*Scott* v. *Cogger*, M. T. 1834, Ex., 3 D. P. C. 212).

BOWER *v.* KEMP, H. T. 1831. Ex. 1 *C. & J.* 287; S. C. 1 *Tyrw.* 260.

An affidavit of merits to set aside a judgment must state a "good defence upon the merits."

ON motion to set aside judgment, it was objected to the sufficiency of the affidavit of merits on which the rule had been obtained, it not being in the usual form, that the defendants had a good defence upon the merits, but that the defendant had "a good and meritorious defence to the action."

Per Cur.—For an application of this nature, it has been long the practice of all the courts to require an affidavit from the defendant that he has "*a good defence upon the merits.*" It is desirable that that practice should be conformed to.

CASH *v.* WELLS, T. T. 1830. K. B. 1 *B. & Ad.* 375.

When set aside because signed contrary to good faith, the Court cannot impose the terms of bringing no action.

UPON application to set aside a judgment signed against good faith, ex debito justitiæ—

The Court said, they could not impose the terms of not bringing any action without the defendant's consent.

VII. RELATIVE TO THE ARRESTING OF*.

ADAMSON *v.* JARVIS, M. T. 1826. C. P. 4 *Bing.* 66; S. C. 12 *Moore,* 241.

Judgment will not be arrested if a cause of action can be inferred, or it can be collected that evidence must have been given to shew a cause of action.

ON motion to arrest a judgment, it appeared that a count in a declaration in an action on the case stated, that the defendant represented and affirmed to the plaintiff, that he, the defendant, was legally entitled to sell and dispose of certain goods, and requested the plaintiff to sell the same by public auction; that the plaintiff, confiding in such representation and affirmation, sold the same, and after deducting certain expenses paid over the residue to the defendant; whereas the defendant deceived and defrauded the plaintiff in this, to wit, that the defendant was not at the time of the sale legally entitled to sell and dispose of the goods: the plaintiff then averred that an action was brought against him by the true owner, and in which he recovered the value of the goods sold, which the plaintiff was obliged to pay him, together with the costs of the action; and assigned for breach, that the defendant, not regarding his duty in that behalf, refused to pay those sums to the plaintiff.

The Court held the declaration sufficient after verdict, although it was objected that there was no averment that the defendant represented to the plaintiff that he was legally entitled to sell, or that the goods were put up to sale at the request of the defendant, or on his

* Upon the construction of 1 Will. 4, c. 7, ss. 2, 4, and 3 & 4 Will. 4, c. 42, s. 17, the Court held, that a motion to *arrest* and vacate a judgment signed in vacation upon a writ of trial before the sheriff might be made in the following term. (*Pyke* v. *Glendinning,* 2 D. P. C. 611). Where the issue contained an "&c." after the replication, and no similiter was added, but it was properly added in the Nisi Prius record:—Held, that there was sufficient to justify the presumption of a perfect record, or that the party would make a perfect one, and rule for arresting the judgment discharged; and semble, the rule of Trin. T. 2 Will. 4, s. 65, was intended only to apply to cases tried in term. (*Brook* v. *Finch,* 6 D. P. C. 313). Mistake of plaintiff's for defendant's name in similiter amendable after verdict, and no ground for arresting judgment. (*Wright* v. *Horton,* E. T. 1817, K. B., 6 M. & Selw. 50; see *Sayer* v. *Pocock,* Cowp. 407).

retainer, and that there was no retainer shewn at the time of the request to put up the goods to sale, as it might be collected that evidence was given to shew a sufficient cause of action.

LEACH *v.* THOMAS, E. T. 1837. Ex. 5 *D. P. C.* 612; S. C. 2 *M. & W.* 427; *overruling* HOLT *v.* SCHOLEFIELD, 6 *T. R.* 691.

If several breaches be assigned after verdict for general damages, one breach improperly assigned is no ground for arresting the judgment.

IN an action on an agreement several breaches were assigned, some of which were badly assigned. The jury gave a general verdict for the plaintiff on all the breaches. On a rule for arresting the judgment, on the ground that the jury had given general damages for breaches, some of which were bad—

Per Cur.—This case must go down again. Here we know that the defendant has been guilty of breaches, but we do not know to what amount. *Holt* v. *Scholefield* must be overruled as to this point. If the Court of Error can grant a venire de novo, there is no doubt the Court with the original jurisdiction may also do it. Had you not better try to come to terms, as we shall certainly grant a new trial? You might have demurred. The rule must be absolute for a venire de novo, to assess the damages on the good breaches.

HAYTER *v.* MOAT, M. T. 1836. Ex. 5 *D. P. C.* 298; S. C. 2 *M. & W.* 56.

So, after reference and award made, one count being bad is no ground for arresting the judgment on the others.

A DECLARATION against an administratrix contained nine counts: the first six alleged promises by the intestate; the seventh was an indebitatus count against her for the funeral expenses; the eighth was for goods sold and delivered to her as administratrix; the ninth was on an account stated. No promise was stated in the seventh count, but the declaration concluded, that, in consideration of the premises, the defendant promised to pay the two last-mentioned sums respectively. The defendant pleaded non assumpsit to the seventh count. The cause went to trial on the issue on the seventh count, and to assess the damages on the others, when a verdict was taken generally for the plaintiff, subject to a reference to a barrister, to certify the amount of damages. He did so, and severed the damages upon the different counts, certifying on the seventh count for the sum of 12*l.* 5*s.* 11*d.* On motion to arrest the judgment—

Per Cur.—One bad count vitiates the whole declaration, because it cannot be known upon what the jury have given their verdict. Here, however, the arbitrator's certificate has cured that. The judgment must be arrested on the seventh count, and for the plaintiff on the others.

THOMAS *v.* JONES, T. T. 1838. Ex. 4 *M. & W.* 28; S. C. 6 *D. P. C.* 663.—S. P. WESTON *v.* FOSTER, 2 *Bing. N. S.* 701.

The Rule of H. T. 2 Will. 4, r. 65, as to moving within the first four days of term, applies to trials as well after as in term.

AT the trial of this cause at the Spring Assizes, 1838, after the jury had appeared the defendant challenged the array, upon the ground that the under-sheriff, who was the attorney for the plaintiff, had summoned the jury. This was denied, and the learned Judge was applied to to appoint triers, which he refused to do. The challenge and answer were put upon parchment, and annexed to the record. The cause was proceeded with and tried. In Easter

Term (but not within the first four days), motion was made to arrest the judgment, or for a venire de novo.

Per Cur.—The application is too late. We think that now every application to arrest the judgment, and, we should say, also for judgment non obstante veredicto, must be made within four days of the time of trial, if in term; and if not, within the first four days of the succeeding term. The object of the new rules was to assimilate the practice in all the courts, in cases where it had previously differed.

GRAVES *v.* WALTER, E. T. 1834. C. P. 1 *Scott*, 311.

After summons to amend and acquiescence, a motion cannot be made in arrest of judgment.

ON motion in arrest of judgment, it appeared that the objections in arrest of judgment were made after summons taken out at chambers, and acceptance by the defendant of costs of amendments acquiesced in.

The Court discharged the rule with costs, leaving him to his writ of error.

ADAMS *v.* MEREDEW, M. T. 1829. Ex. 3 *Y. & J.* 419.

Judgment had been arrested, but, upon error, had been reversed:—Held, that the plaintiff was entitled to the costs of the motion, in arrest of judgment.

THE plaintiff obtained a verdict, and the Court of Exchequer arrested the judgment, which judgment was reversed by the Court of Exchequer Chamber. The plaintiff obtained a rule calling upon the defendant to shew cause why the Master of this Court should not be directed to review his taxation, and allow to the plaintiff his costs, occasioned by the motion in arrest of judgment.

Per Cur.—We have carefully considered the subject of this application, and have made inquiry from all sources from which information could be obtained, and, in the result, are of opinion that this rule should be made absolute. If the plaintiff had succeeded in this Court, he would have had his costs as costs in the cause: but he has been prevented from standing in that position by the judgment of this Court, which we are now bound to assume was erroneous; and it therefore appears to us that the justice of the case would fail if the plaintiff were not now to be considered as being in the same situation as if he had succeeded in the first instance. We therefore think that the plaintiff is entitled to the costs of arresting the judgment.

VIII. RELATIVE TO THE RELATION OF*. See tits. *Bankrupt—Executor—Insolvent.*

IX. RELATIVE TO THE DOCKETTING OF.

ENGLER *v.* TWISDEN, H. T. 1839. C. P. 4 *Bing. N. S.* 714; S. C. 6 *Scott*, 580.

A rule to enter and docket must be ad-

A RULE, calling on the plaintiff to docket the judgment, was objected to, because the rule should have been addressed to the plaintiff, and not to his attorney.

* The three days previous to the day fixed for the commencement of the term are now no part of the term, but part of the preceding vacation; and a judgment entered must be considered as of the preceding term. (*Price* v. *Hughes*, H. T. 1832, B. C., 1 D. P. C. 448). This case was before Rule H. T., 4 Will. 4, requiring judgments to bear date the day signed.

dressed to the plaintiff, and not to his attorney.

The Court considered the objection, that the plaintiff, and not his attorney, should have been called upon, valid, and rule discharged, with costs.

HOPWOOD *v.* WATTS, H. T. 1834. K. B. 3 *N. & M.* 146; S. C. 5 *B. & Ad.* 1056.

The Court will not amend the docket, so as to give priority.

THE issue had been docketted, the number of the judgment-roll being affixed to the issue, but there had been no docket of the judgment.

The Court held this not a sufficient docket within the stat. 4 & 5 W. & M., and refused an application to docket the judgment nunc pro tunc, where the effect would be to give priority over a mortgagee.

FINCH *v.* BROOKE, E. T. 1836. C. P. 2 *Bing. N. S.* 710; S. C. 2 *Scott*, 511.

Omitting to enter up judgment, but merely indorsing the costs allowed, is irregular.

UPON a rule granted to enter up judgment and issue execution, and the plaintiff omitted to enter an incipitur, but merely indorsed the costs allowed, and issued execution—

The Court held it irregular.

X. RELATIVE TO THE AMENDING OF, AND SIGNING IN CASE OF AMENDMENT*. See, also, tits. *Amendment —Error, Writ of.*

FLINDELL *v.* FAIRMAN, M. T. 1822. Ex. 11 *Price*, 410.

A judgment may be amended as to the sum;

THE attorney, by mistake, entered the sum upon the judgment-roll as 105*l.*, instead of 100*l.* 5*s.*, but on the same day apprised the party of the mistake, and gave the officer notice of the true sum for which the party was to be detained.

The Court allowed the roll to be amended by the postea and allocatur, and the committitur to be corrected so as to correspond with the record, upon payment of costs of the amendment, but without costs of the motion, and discharged a rule to discharge the defendant out of execution, with costs.

REX *v.* CARLILE, E. T. 1831. K. B. 2 *B. & Ad.* 971.

but the Court of error will not amend a judgment in a subsequent term, after judgment.

THE Court of K. B., upon a writ of error on a judgment at the Old Bailey, refusing to allow the defendant to aver a fact in contradiction to the record, affirmed the judgment; and, by consent, the clerk of the sessions in the following term attended, and amended the record as to the fact, and it was moved that the case might be again entered in the Crown papers for argument.

The Court held, that it had no power, even by consent, to alter

* If a plaintiff takes out a summons to amend his declaration, the defendant has a right to presume that it will be followed up by a peremptory summons, and therefore it will operate as a stay of proceedings for one day; consequently, when the time for pleading was out on the day on which the peremptory summons could be made returnable, a judgment signed for want of a plea, on the morning of the next day, was held irregular. (*Hodgson* v. *Caley*, H. T. 1840, B. C., 8 D. P. C. 318).

the judgment it had given in a previous term. After the expiration of the term, it can only be vacated by writ of error to the House of Lords, which would only take notice of the amended record.

XI. RELATIVE TO THE WITHDRAWING OF*.

XII. RELATIVE TO WHEN EVIDENCE, AND EFFECT OF†.

STAFFORD *v.* CLARK, M. T. 1824. C. P. 2 *Bing.* 377; S. C. 1 *C. & P.* 24.

Where plaintiff had recovered damages in trover for two bills, and afterwards brought assumpsit to recover the amount of them, the judgment was admitted in evidence though not conclusive.

IT appeared that in Trinity Term, 1823, the plaintiff brought an action of trover against the defendant, in which they sought to recover among other things certain bills of exchange, and they obtained a verdict for 72*l.* In Hilary Term last, the plaintiffs brought an action of assumpsit against the defendant for goods sold and delivered and on the common money counts. The defendant at the trial gave the office copy of the judgment in the first action in evidence as a bar to the plaintiff's recovering the amount of those two bills of exchange. This evidence was objected to by plaintiff's counsel, on the ground that the judgment should have been pleaded, which objection was overruled by *Best*, C. J., who allowed the judgment to be given in evidence.

By the Court.—It is quite clear that the office copy of the judgment was admissible in evidence at the trial. Whether it were conclusive or not it is now immaterial to consider. There can be no doubt but that a record is admissible in evidence; if it were held not to be so it would be running counter to all previous authorities.

XIII. RELATIVE TO THE SET-OFF OF. See also, ante, tit. *Costs.*

BOURNE *v.* BENNETT, H. T. 1827. C. P. 4 *Bing.* 423; S. C. 1 *M. & P.* 141.

Before Rule H. T. 2 Will. 4,

THE plaintiff, being indebted to B., (a co-defendant with others), in a large sum upon a cognovit, obtained a judgment and damages in

* Where the plaintiff withdrew the judgment he had signed for want of plea:—Held, that he was not liable to the costs of subsequent summonses for setting it aside. (*Hargrave* v. *Holden*, H. T. 1834, Ex., 3 D. P. C. 176).

† One of several defendants in an action ex contractu suffering judgment by default:—Held, not a competent witness for the plaintiff to prove the other defendants' liability as co-partners. (*Green* v. *Sutton*, 2 M. & Rob. 269). A warrant of attorney is then only an answer to an action for money secured by it when judgment has been entered up on it. (*Davison* v. *Overend*, M. T. 1833, N. P., 6 C. & P. 222). In a writ and notice of declaration the defendant was named Richard, in the declaration Joseph; judgment by default was signed in the latter name:—Held, that the judgment was regular; and that though the declaration might have been objected to as varying from the writ, yet the application should have been made within four days from the service of the notice of declaration, or at least before the time for pleading had expired. (*Kitchen* v. *Roots*, H. T. 1840, Ex., 8 D. P. C. 232). Judgment not considered as signed until the allocatur is complete by the insertion of the amount of costs. (*Butler* v. *Bulkeley*, 1 Bing. 233; S. C. 7 Moore, 104).

fudgments might be set off without reference to the attorney*;

an action of trespass, the defendant, B., being the substantial defendant and bound to indemnify the others.

The Court, regretting the practice as to not indemnifying the attorney, made the rule absolute for setting off the judgments against each other.

BRIDGES *v.* SMYTH, M. T. 1831. C. P. 8 *Bing.* 29; S. C. 1 *M. & Scott,* 93.

and issuing execution on a judgment does not preclude it from being set off.

A. OBTAINED two judgments against B. in the Court of Common Pleas, and died, his representative issued execution; and B., two terms subsequently, obtained a judgment against A. in the King's Bench.

The Court held, 1st, that B. having been prevented from obtaining a judgment earlier by a rule of reference as to the amount of damages, the judgment might have been entered nunc pro tunc; and that, at all events, so long as it subsisted the Court of Common Pleas could not say it was irregular; 2nd, that the right of setting off the judgments was not affected by A.'s representative having taken the step of issuing execution; 3rd, that the judgments did not accrue in a different right by the death of A., the rights of the creditors of A. being limited only to the amount of assets, which in that case would be the balance on the judgment; and lastly, that A.'s attorney, being to be taken to be cognizant of the practice of not allowing the lien of the attorney to interfere with the rights of the parties, and also of the rule as to setting off judgments, he having refused to allow the set-off, ought to pay the costs of the application which he had rendered necessary.

HEWETT *v.* PIGGOTT, M. T. 1831. C. P. 1 *D. P. C.* 250; S. C. 8 *Bing.* 61; S. C. 1 *M. & Scott,* 122.

But, a judgment cannot be set off where the plaintiff has sued the sheriff for a false return.

THE plaintiff having obtained judgment against E., issued execution, to which the sheriff had returned nulla bona, and the plaintiff having sued the sheriff for a false return the latter obtained a verdict—

The Court held, that the plaintiff was not entitled to set off the costs in the latter action against his own judgment, notwithstanding the plaintiff had been indemnified by E.'s attorney, to whom with others the property of E. had been conveyed in trust.

XIV. RELATIVE TO SCI. FA. ON. See, also, post, tit. *Sci. Fa.*

HOLLAND *v.* PHILLIPPS, E. T. 1839. Q. B. 10 *Ad. & E.* 149; S. C. 2 *P. & D.* 336.

In a sci. fa., on a judgment, the Court allowed the official assignee's

THIS was a sci. fa., on a judgment entered up by Hayward against Phillipps. On the 11th of July, 1837, Hayward became a bankrupt; and, on the 17th of December, 1837, this proceeding was instituted. The defendant pleaded, 1st, that Hayward did not become a bankrupt; and, 2ndly, payment to Hayward. The plaintiffs then dis-

* But, by Rule H. T. 2 Will. 4, no set-off allowed in prejudice of the attorney's lien. Where there was a rule for a new trial pending as to a verdict, the Court refused a rule for setting off the amount of the verdict against that of the defendant. (*Garrick* v. *Jones,* E. T. 1833, B. C., 2 D. P. C. 157).

covered that the official assignee had not been joined in the action. On motion to amend, by adding the name of the official assignee—

name to be added.

The Court granted the application.

XV. RELATIVE TO WHAT IS A SATISFACTION OF, AND OF THE ENTRY ON THE ROLL.

TARLETON *v.* ALLHUSEN, M. T. 1834. K. B. 2 *Ad. & E.* 32.

THIS was an action for goods sold and delivered, to which the defendants pleaded a set-off. The right of the plaintiffs to recover in this action depending upon which side the balance of the account stood, it became necessary, amongst other things, for the plaintiffs to prove payment of a bill of exchange for 1,800*l.*, which was drawn by Tarleton, who handed it over to Pollard, who paid it away to the defendants. This bill, when due, was dishonoured, it being in the hands of the defendants' bankers, who sued Tarleton, and obtained judgment, but there was no proof of the judgment having been satisfied, and the bankers afterwards returned the bill to the defendants. It was contended, on the part of plaintiffs, that a judgment so obtained was equivalent to payment; but Lord *Lyndhurst* thinking that, without shewing any produce under the judgment, it could not be considered as payment, and, if not payment, the balance on the account being in favour of the defendants, nonsuited the plaintiffs, and—

An unproductive security, in lieu of a judgment, does not amount to a satisfaction.

The Court refused to interfere.

M'CORMICK *v.* MELTON, M. T. 1834. Ex. 1 *C., M. & R.* 525; S. C. 3 *D. P. C.* 215; 5 *Tyrw.* 147.

To an action of debt on a judgment; plea, that defendant had been taken in execution, on a writ of ca. sa., upon the judgment; replication, that defendant was discharged from that writ by a Judge's order for irregularity, and that the previous taking in execution was on the same judgment. Demurrer thereto and joinder.

A ca. sa., set aside for irregularity, is no satisfaction of the judgment.

The Court held, that as there was no averment of an actual previous writ, and the writ mentioned in the plea had been set aside for irregularity, there was no answer to the action, and the replication was sufficient.

WOOD *v.* HURD, T. T. 1836. C. P. 5 *D. P. C.* 188; S. C. 3 *Bing. N. S.* 45; S. C. 3 *Scott*, 368.

ON motion that satisfaction might be entered upon the judgment-roll, without imposing upon the plaintiff the necessity of giving a warrant of attorney to a professional person to acknowledge the same—

To enter satisfaction on the roll, the plaintiff's warrant of attorney is requisite*;

The Court will not allow satisfaction to be entered upon the

* Where a party died intestate, and no administration taken out for three years, the Court refused to order satisfaction to be entered on the roll. (*Speach* v. *Slade*, M. T. 1823, C. P., 8 Moore, 461).

judgment-roll without a warrant of attorney from the plaintiff to acknowledge the same. The consent of the parties will not suffice.

DAVIS *v.* JONES, E. T. 1837. C. P. 4 *Scott*, 202.

and if judgment be obtained by five plaintiffs, a warrant signed by four is insufficient.

IN this action there were five plaintiffs. On motion to allow satisfaction to be entered on the judgment-roll, upon a warrant signed by four of the plaintiffs, an affidavit was produced that the fifth plaintiff was abroad; but—

The Court refused the application.

XVI. RELATIVE TO JUDGMENTS IN INFERIOR COURTS.

READ *v.* POPE, T. T. 1834. EX. 1 *C., M. & R.* 302; S. C. 4 *Tyrw.* 403.

In an action on a judgment in an inferior court, the declaration must aver that the cause of action arose within the jurisdiction*.

THE declaration on a judgment obtained in a county court stated, that the plaintiff, who was plaintiff in the county court, recovered the judgment within the jurisdiction of the county court, but did not allege that the cause of action in the original suit arose within the jurisdiction of the county court. General demurrer.

Per Cur.—The ground of the demurrer was, that it was not alleged that the cause of action in the original suit arose within the jurisdiction of the court below. We have spoken to the other Judges of the other Courts on the subject, and they concur with us in thinking the defect fatal.

THOMPSON *v.* BLACKHURST, H. T. 1833. K. B. 1 *N. & M.* 266.

In an action of trespass, a judgment in the county court is not conclusive.

THIS was an action of trespass to the plaintiff's goods and chattels, with an asportavit; to which the defendant pleaded the general issue, and also, that a plaint was levied in the county court of Lancashire, and taliter processum est, and judgment thereon, and a justification, under the process of that Court. Replication, de injuriâ.

The Court held, that he was bound to prove an appearance by the plaintiff in the court below. The judgment of a court, not of record, is not conclusive of an appearance having been entered.

* A court for the recovery of debts under 40*s.* may give judgment for the plaintiff, although it appears that the debt was above 40*s.*, if the plaintiff will waive so much of his debt as will bring his claim under the 40*s.*, provided there be nothing in the act of Parliament constituting that court which prevents his so doing. The judgment of a court for the recovery of debts under 40*s.* is not conclusive; but proof that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits, is proper for the consideration of the jury. (*Barnes* v. *Winkler*, T. T. 1826, N. P., 2 C. & P. 345). Where a judgment has been removed from an inferior jurisdiction, pursuant to 1 & 2 Vict. c. 110, s. 22, the Court will not inquire into the regularity of the proceedings of the court below previous to judgment. (*Simons* v. *Count de Wints*, T. T. 1840, B. C., 8 D. P. C. 646).

XVII. RELATIVE TO IRISH AND SCOTCH JUDGMENTS.

FERGUSON *v.* MAHON, M. T. 1839. Q. B. 3 *P. & D.* 143.

In an action on an Irish judgment identity must be shewn.

IN debt on a judgment in the C. P. in Ireland, plea, that the defendant was never arrested nor served, nor at any time had notice of any process at the suit of the plaintiff for the cause of action on which the judgment was recovered; replication, that, before the judgment recovered, the defendant had notice of certain process for the cause, &c. On demurrer—

The Court held the plea bad in not shewing it to have been at the suit of the plaintiff, or in the same action. Such a judgment, although for some purposes a record, yet it is still open to inquiry, not into the merits or propriety of the decision, but whether it passed under such circumstances as shewed the Court to have jurisdiction over the party.

GUINNESS *v.* CARROLL, M. T. 1830. K. B. 1 *B. & Ad.* 459.

The plaintiff, in whose favour a judgment in Ireland has been signed, may sue, although it be pleaded that he has become bankrupt, and an assignee appointed.

THIS was an action upon a judgment obtained by the plaintiff in the Court of King's Bench in Ireland against the defendant. The case was before this Court in Easter Term, 1828, when, in consequence of a defect in the defendant's pleadings, judgment was given for the plaintiff; but the defendant afterwards obtained leave to amend. He amended accordingly:—That the judgment declared upon was obtained after the plaintiff had become a bankrupt, according to the Irish bankrupt law, and after one Archer had become his assignee. On demurrer—

Per Cur.—The plaintiff must be taken to be a trustee for the benefit of the creditors; and, therefore, the action, in point of law, is maintainable in his name.

DOUGLAS *v.* FOREST, H. T. 1827. C. P. 4 *Bing.* 686; S. C. 1 *M. & P.* 663.

An action lies upon a Scotch judgment.

DECREES in the Court of Sessions in Scotland had been obtained, after due proclamation, against a party, a native of Scotland, and having heritable property there, though whilst absent in the East Indies.

The Court held, that such judgments being according to the law of Scotland, and recognized by 54 Geo. 3, c. 137, an action was maintainable thereon in the courts of this country. The action having been brought against the executor, who had only lately, within six years, taken upon himself to act, and so no person against whom the action could have been brought, the deceased never having been in England since the decrees were made; held, that the defendant was not bound by the Statute of Limitations.

COWAN *v.* BRAIDWOOD, M. T. 1840. C. P. 9 *D. P. C.* 26; S. C. 2 *Scott, N. S.* 138.

To an action on a Scotch judgment the defendant cannot plead a mere

PLEA to an action of assumpsit on a Scotch decree, that the defendant was absent from Scotland during the whole of the proceedings, and had no notice of them so as to make him to appear and plead. On demurrer to the replication—

conclusion of law.

Per Cur.—Here there is a declaration in the ordinary form on a Scotch decree. The plea sets up that the decree is contrary to natural justice; but on what ground is it so alleged? It is to be observed that the allegation, that the decree is contrary to natural justice, is not traversable; it is merely a conclusion of law arrived at from certain allegations contained in the plea.

XVIII. RELATIVE TO FOREIGN JUDGMENTS. See also, ante, tit. *Foreign Judgment.*

Obicini *v.* Bligh, E. T. 1832. C. P. 8 *Bing.* 335; S. C. 1 *M. & Scott,* 477.

In an action on a foreign judgment, it should appear that the defendant was within the jurisdiction of the Court, and appeared*.

In an action on a judgment in a foreign vice-admiralty court, where the transcript of the proceedings did not clearly shew the defendant to have been brought within the jurisdiction of that court, nor present at any of the proceedings, but rather the contrary was to be inferred, nor did the party or any agent reside there, nor was there any appointment of one by him, and an interlocutory decree was referred to, but not set out—

The Court, upon such imperfect proceedings set out, directed a nonsuit.

But see Molony v. *Gibbons,* 2 *Campb.* 502.

Scott *v.* Bevan, H. T. 1831. K. B. 2 *B. & Ad.* 78.

In an action on a Jamaica judgment, the sum recoverable is according to the rate of exchange.

In an action on a judgment recovered by the plaintiff against the defendant in the supreme court of Jamaica—

The Court held, that the plaintiff, in an action on a foreign judgment, has a right to recover in sterling a sum which, according to the rate of exchange between England and the foreign country at the time of the judgment, would at that time be equal to the sum if paid in the currency of that country.

* A foreign judgment may be given in evidence, and made the subject of proceedings in another country, but the subject-matter of such judgment is liable to be inquired into; where, therefore, a decree in the Court of Chancery in England was made the ground of suit in the Irish Court of Chancery, and had been dismissed on a supposed want of jurisdiction, the decree of the latter reversed and sent back with a declaration that the propriety of the English decree might be examined, and, if sustainable in part, it might be so far executed by the aid of the Irish Court, although other parts might be deemed erroneous. (*Houlditch* v. *Marquis of Donegal,* 8 Bligh, 301; S. C. 2 Cl. & F. 470).

A foreign judgment is impeachable here for fraud; where, therefore, to a bill for an account by a customer against the defendants (foreign bankers) for an account and for an injunction to restrain them from suing on a foreign judgment, it appeared that, notwithstanding the judgment, the balance was still greatly in favour of the plaintiff, demurrer overruled. (*Bowles* v. *Orr,* 1 Younge & C. 464).

XIX. RELATIVE TO WRIT OF FALSE JUDGMENT*.

WATSON *v.* WALKER, E. T. 1832. C. P. 8 *Bing.* 315; S. C. 1 *M. & Scott*, 437.

On motion to set aside a writ of false judgment, the affidavit must not be intitled in the Court below.

RULE nisi to set aside a writ of false judgment, sued out by Walker, the defendant below, in the above cause, having been obtained upon an affidavit, intitled "In the Common Pleas, *Watson* v. *Walker*," it was objected that the affidavit should have been intitled "*Walker* v. *Watson*," Walker being the plaintiff upon the writ of false judgment.

The Court discharged the rule.

Judgment in Criminal Proceedings.

See ante, tit. *Indictment*.

Judgment Recovered.

REG. GEN., H. T. 4 WILL. 4, K. B., C. P., and Ex.

By Rule, in a plea of judgment recovered in another court, the number of the roll must be stated in the margin.

IT is ordered, that where a defendant shall plead a plea of judgment recovered in another Court, he shall, in the margin of such plea, state the date of such judgment, and if such judgment shall be in a Court of record, the number of the roll on which such proceedings are entered, if any, and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on procuring a certificate from the proper officer or person having the custody of the records or proceedings of the Court, where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea by leave of the Court or Judge.

POOLE *v.* SALTER, M. T. 1831. Ex. 2 *C. & J.* 85; S. C. 2 *Tyrw.* 139.

Before that rule, if a plea of judgment recovered were false the Court would not set it aside unless the plaintiff applied promptly.

ON a rule to shew cause why the plaintiff should not be at liberty to treat the defendant's plea of a judgment recovered as a nullity, and to sign judgment as for want of a plea. The affidavit stated that defendant had pleaded in Trinity Term; that the plea was false, and that the defendant's attorney had written to the plaintiff's attorney in the early part of the present term, informing him that the defendant was about to enter into a composition with his creditors, to which the plaintiff had better accede, as by the plea put in he had already been enlarged three months.

* A rule for entering up judgment in a writ of false judgment having been made absolute, costs were taxed, and the Prothonotary's allocatur indorsed on the back of the rule; the plaintiff then issued execution without further entry or signing judgment:—Held irregular. (*French* v. *Burke*, M. T. 1835, C. P., 2 Bing. N. S. 710).

The Court said, the plaintiff should have applied promptly, or he should have taken proceedings to obtain judgment in the regular course by replying to the plea early in the term.—Rule refused.

SMITH *v.* NICHOLLS, H. T. 1839. C. P. 5 *Bing. N. S.* 308; S. C. 7 *D. P. C.* 282.

A plea of judgment recovered, in the Vice-Admiralty Court of Sierra Leone, no bar to a count on the original ground of action.

IN trover for the value of certain boats and goods on board thereof, wrongfully seized and converted by the defendant, a plea alleging that the plaintiff had obtained the judgment of a foreign court (the Vice-Admiralty Court of Sierra Leone) for the damages sustained by the tort, without shewing that the judgment was binding and conclusive between the parties, and a bar to an action in the colony itself—

The Court held the plea bad. The obtaining of a judgment in the foreign court does not change the nature of the original cause of action, nor is such cause of action merged in the judgment as it would be in the judgment of a Court of record in this country. In the principal case the foreign judgment is merely evidence of a contract or agreement between the parties.

BRISCOE *v.* STEPHENS, T. T. 1824. C. P. 2 *Bing.* 213.

And to a plea of judgment recovered in an inferior Court, it is a good replication that the cause of action arose, and that both parties resided, out of the jurisdiction.

IN this plea all the proceedings in the plaint in the inferior Court were set out, from which it appeared in the declaration in that plaint that the plaintiff had declared that the defendant, being indebted within the jurisdiction of the Court of Ludlow for goods sold, promised within its jurisdiction to pay the plaintiff; but did not in any count state that the goods were sold, or that the cause of action arose within the jurisdiction of that Court. The plaintiff replied that at the time he levied his plaint in the Court at Ludlow, and from thence till the time judgment was obtained in that plaint, both himself and the defendant were residing within the jurisdiction of that Court; that the causes of action arose out of its jurisdiction; and that the Court had not at the time of levying the plaint, or at any time afterwards, jurisdiction over the causes of action. Demurrer and joinder in demurrer.

Per Cur.—We must take it that the facts stated in the replication are true, and if so, the inferior Court had no jurisdiction, for the plaintiff not only avers that the parties did not reside within the jurisdiction, but also that none of the causes of action arose there, both of which circumstances were necessary to confer jurisdiction.

See 3 *Lev.* 234, *id.* 243.

Jury*.

I. RELATIVE TO JURORS IN GENERAL.

(*a*) WHO MAY BE, AND OF THE JURY PROCESS, p. 425.
(*b*) RIGHTS OF, p. 427.
(*c*) OF STATEMENTS BY, p. 427.

* Statute regulating 6 Geo. 4, c. 50.—From the length of this statute it has been desirable only to state that it repeals all the prior acts, and consolidates the

I. RELATIVE TO JURORS IN GENERAL—*continued.*

(*d*) Of the fining, p. 427.

(*e*) Of the discharge of, p. 428.

(*f*) Of the expenses of, p. 428.

(*g*) Effect of absconding or personating, p. 428.

(*h*) Of the verdict, p. 429.

II. RELATIVE TO SPECIAL JURORS.

(*a*) Summoning, and striking of, and swearing, p. 429.

(*b*) Rule for, and when to be applied for, p. 430.

(*c*) Duty of party obtaining, p. 430.

(*d*) Of the tales, p. 431.

(*e*) Certificate for, p. 431.

(*f*) Costs of, and fee to, p. 432.

III. RELATIVE TO THE GRAND JURY, p. 432.

IV. RELATIVE TO A GOOD JURY, p. 433.

I. RELATIVE TO JURORS IN GENERAL*.

(*a*) Who may be, and of the jury process.

Atkinson, *Ex parte*, H. T. 1834. C. P. 10 *Bing.* 399; S. C. 2 *D. P. C.* 773; S. C. 4 *M. & Scott*, 160.

Holding a situation under the

The Postmaster-General is appointed by letters patent under the great seal. The patent contains the following: "We do declare

whole law upon the subject into one compendious legislative declaration. The primary objects of the new Jury Act were—1st, to consolidate, simplify, and amend the existing law relating to the qualification, summoning, and formation of juries; 2ndly, to increase the number of persons qualified to serve on juries; for, as the population and wealth of the country augment, civil and criminal suits necessarily multiply; it became desirable, therefore, to lighten the duties of those who are liable to be called from their private pursuits to aid the administration of justice; 3rdly and lastly, to remove the complaints which had long been urged on the partial and defective mode of striking special juries. And see 7 & 8 Geo. 4, c. 28, s. 3; and 5 & 6 Will. 4, c. 76, s. 121.

* Since the Jury Act, 6 Geo. 4, c. 50, the Crown is not to be put to shew grounds of challenge of jurors, in a case of felony, till the panel is exhausted, and that statute makes no alteration of the law in this respect. (*Rex* v. *Parry*, 1837, N. P., 7 C. & P. 836). Prisoner, in a case of felony, having challenged twenty jurors peremptorily, cannot withdraw one of those challenges to challenge another juror, instead of one that he had previously challenged. (*Ib.*) On an objection to the panel, on an indictment for maliciously setting fire to premises, that the sheriff was an inhabitant of the hundred:—Held, that proof of the notice and examination required, in order to entitle the party injured to recover against the hundred, was essential to sustain such challenge. (*Rex* v. *Savage*, 1 R. & M. 51). Where a Quaker had served on a Crown jury without being sworn, but only affirmed:—Held, that the conviction was bad, but might be reversed on error, and the prisoner tried on a fresh indictment. (*Rex* v. *Channers*, 1826, 1 Moo. C. C. 374).

Postmaster-General's patent is an exemption as a juryman.

our will and pleasure to be, that the said Postmaster-General, and all deputies, officers, and servants to be by him appointed as aforesaid, shall not be compelled or compellable to serve on any jury or inquest, or to appear or serve at any assize or session, or to bear any public office or employment, either ecclesiastical, civil, or military." The 6 Geo. 4, c. 50, s. 11, contains certain exemptions from serving on juries; and it also contains the following proviso: "That all persons exempt from serving upon juries in any of the Courts aforesaid, by virtue of any prescription, charter, grant, or writ, shall continue to have and enjoy such exemption in as ample a manner as before the passing of this act, and shall not be inserted in the lists hereinafter mentioned." The applicant, who applied to be discharged from serving as juror, was appointed by the Postmaster-General—

Tindal, C. J., said it was the unanimous opinion of the Judges that the applicant was exempt under the 6 Geo. 4, c. 50.—He was accordingly discharged from attendance.

REX *v.* DESPARD, T. T. 1828. K. B. 2 *M. & Ry.* 406; S. C. 8 *B. & C.* 417, *by name of* REX *v.* SUTTON.

Alienage, though a disqualification, must be objected to as to petty jury, before sworn, and as to special juryman, before struck*.

MOTION on arrest of judgment on the ground that one of the jurors having been an alien, and disqualified from serving, there had been a mistrial—

Per Cur.—The disqualification now relied on is a good cause of challenge to the poll. It has always been so at common law, and it was expressly continued so by the statute of William & Mary; but where it is a good cause of challenge, as in the case of a common jury, it is clear that, if the juror objected to is not challenged before he is sworn, supposing the party at that time knew of the objection, the opportunity of making the objection is gone; and as to a special juryman, the objection must be taken before he is struck.

BRUNSKILL *v.* GILES, T. T. 1832. C. P. 9 *Bing.* 13; S. C. 2 *M. & Scott*, 41.

It cannot be objected that the jury were convened by the partner of the plaintiff's attorney,

THIS was a motion on the part of the defendant, that a verdict found for the plaintiff might be set aside, and a venire de novo issued, on the ground that the secondary, whose duty it was to strike the jury, was the brother and partner of the attorney for the plaintiff.

The Court refused to grant a venire de novo, on an objection that the secondary, who struck the jury, was the brother and partner of the plaintiff's attorney; it not being shewn that the party came to the knowledge of the fact in such a manner, and at such a time, as to render it impossible for him to tender a formal challenge at the proper time.

REX *v.* SULLIVAN, M. T. 1838. Q. B. 1 *P. & D.* 96.

or that one of the jurors had sat on the grand jury, after verdict†.

ON the trial of a misdemeanour by a special jury, after they had been sworn, it appeared that one of them had been on the grand jury when the indictment was found. It was then proposed that he

* It seems that this objection is taken away as to special juries by 6 Geo. 4, c. 50, s. 27.

† The Court refused to direct the jury process, on the trial at bar of a writ of right for the recovery of lands in Buckinghamshire, to be awarded to the sheriff

should leave the box, but the defendant refused to allow that to be done.

Lord *Denman*, C. J., said, that in this case no challenge had been taken by the defendant when the jury were struck; and when it was proposed to leave the juryman out of the jury box, the defendant refused, but chose to rely upon the strict law. We think the objection made to the trial is unfounded.

(*b*) Rights of*.

(*c*) Of statements by.

Straker *v.* Graham, H. T. 1839. Ex. 4 *M. & W.* 721; S. C. 7 *D. P. C.* 223.

Affidavits of statements made by jurymen inadmissible to impugn a verdict†.

A rule had been obtained for a new trial, on the ground that the verdict was against the evidence, and also upon an affidavit by the attorney for the plaintiff of alleged misconduct on the part of the jury, founded on a statement made to him by one of the jurymen after the delivery of the verdict.

Per Cur.—Where a jury have unanimously concurred in a verdict delivered in open court, we think it would be extremely dangerous to admit an affidavit of this sort to overturn it; we therefore wish distinctly to say that we cannot attend for a moment to the affidavit, but that we reject it entirely.

(*d*) Of the fining of‡.

Ex parte Clarges, E. T. 1827. Ex. 1 *Y. & J.* 399.

A party's being absent at

On motion to exonerate a juryman from a fine, it appeared that the party, having a house in town where the summons had been left,

of Middlesex, upon suggestion that the tenant was possessed of large property and great popularity and influence in the former county, and the demandants poor and obscure persons, resident in Wales. (*Davis* dem., *Loundes* ten., 6 Scott, 435). Where a cause made a remanet has been tried, a verdict found for the plaintiff, and judgment signed by him, it is too late to object that the jury process was altered before the trial without proper authority, though the defendant swears that he did not discover the supposed irregularity till the taxation of costs. (*Dubois* v. *Keats*, 8 Ad. & E. 945).

* After the jury are charged, they can only state a question, and receive the law from the Court; the Court therefore refused to permit them to have a law treatise on the subject which had been cited. (*Burrows* v. *Unwin*, H. T. 1828, N. P., 3 C. & P. 310). Where, in a criminal prosecution, it is essential to prove the particular value of an article, the jury may use that general knowledge which any man can bring to the subject; but if any of the jurors has a particular knowledge on the subject, arising from his being in the trade, he ought to be sworn and examined as a witness. *Rex* v. *Roper*, 1836, C. C. C., 7 C. & P. 648).

† Though the affidavits of individual jurors are not, on grounds of public policy, receivable to impugn their own verdict, yet the affidavits of persons within hearing are admissible to give the Court that information which cannot be derived from a party implicated. (*Harvey* v. *Hewitt*, T. T. 1840, B. C., 8 D. P. C. 598).

‡ The Court will not hear counsel for a juryman who has been fined for contempt. (*Carne* v. *Nicoll*, 3 Dowl. P. C. 115). Where an issue was directed by a court of equity to be tried at bar by a special jury of a county in which the

Brighton from his house in London for twelve months is no ground for remitting the fine.

had been residing for a twelvemonth past at Brighton, and never received any intimation until process issued to levy the fine.

The Court refused to remit the fine, the 6 Geo. 4, c. 50, s. 38, not requiring personal service, although the facts, if they had been stated at the time to the Judge at Nisi Prius, might have been deemed a sufficient excuse for non-attendance.

Ex parte Ford, E. T. 1827. Ex. 1 *Y. & J.* 401.

Aliter, if he be abroad, and the summoning officer so informed,

A juror had been fined; on motion to remit the fine, it appeared by affidavit that the party summoned had left his house and was abroad, and that that fact had been communicated to the summoning officer at the time he left the summons.

The Court remitted the fine.

Ex parte Brown, E. T. 1827. Ex. 1 *Y. & J.* 401.

or if the summons be left at the wrong house.

In this case it appeared by the affidavits of the applicant and of the summoning officer, that the summons had not, through mistake, been left at the usual place of abode of the applicant. Upon motion—

The Court remitted the fine.

(*e*) Of the discharging of*.

(*f*) Of the expenses of†.

(*g*) Effect of absconding or personating.

Harrison *v.* Bennett, M. T. 1832. Ex. 1 *C. & M.* 203; S. C. 1 *D. P. C.* 627; S. C. 3 *Tyrw.* 740.

Where one of the jurors ab-

At the first trial the jury retired to consider their verdict, and on coming into court found a verdict for the plaintiff, without any

cause did not arise, the Court fined those special jurors who did not attend, it being proved that they were duly summoned. (*Layburn* v. *Crisp*, 8 C. & P. 397). And the Court will fine the summoning officer if not in attendance when a fresh jury is called, as in default of their appearing they cannot be fined without his evidence. (*Duffill* v. *Spottiswoode*, E. T. 1828, N. P., 3 C. & P. 437).

* Where a jury is discharged by the Judge of his own authority from finding a verdict, they being unable to agree, the ultimately successful party is not entitled to the costs of the first attempt at trial. (*Waite* v. *Spurgin*, H. T. 1836, B. C., 4 D. P. C. 575). Where the jury do not agree, and neither party will consent to withdraw a juror or come to terms, the Judge has authority to discharge the jury. (*Cook* v. *Caldecot*, T. T. 1830, N. P., 4 C. & P. 315). And, where upon an issue out of Chancery the jury could not agree, and the parties would not consent to discharge them, as the verdict was only to inform the conscience of the Chancellor, and he might send it down again for trial; or, as, in the case of eleven agreeing, and the other juryman refusing to assign any reason for not concurring, he might be satisfied without a formal verdict, the Judge took upon himself the responsibility of discharging them. (*Morris* v. *Davies*, 1828, N. P., 3 C. & P. 427).

† The Court have no power to order the travelling and other expenses of a special jury summoned from a distant county to a trial at bar. (*Rex* v. *Pinney*, 1832, N. P., 5 C. & P. 254). See also post, p. 432.

damages. By the direction of the learned Judge they were again retiring when one of the jurors absconded, and as he could not again be found, and the plaintiff would not consent to a verdict of eleven, the other jurors were discharged. On the second trial the plaintiff obtained a verdict, but the Master refused to allow the costs of the new trial.

Per Cur.—We think this case comes very much within the principle adopted in the case of a remanet. The plaintiff was not bound to be satisfied with a verdict of eleven jurors, and the finding of the second jury shews that the defendant was the cause of the litigation; the plaintiff therefore ought to have his costs of the first trial.

second, and the plaintiff refuses to take the verdict of the eleven, and a new trial is had, and he obtain a verdict, he is entitled to the costs of the first trial.

REX *v.* TREMEARNE, H. T. 1826. K. B. 5 *B. & C.* 254.

THE defendant was convicted. In the course of the afternoon of the day of trial, and after the conviction, it was discovered that a young man under age, named Richard Heard Williams, not qualified by estate to serve on a jury, had attended in place of his father, named John Williams, who had been properly summoned, but who was unable on account of illness to attend, had answered to his father's name when it was called by the officer of the Court, and personating his father had served on the jury. Neither the young man nor his father knew any of the parties to the indictment, and there was no reason to believe that there was any unfair dealing, or any impropriety beyond the mere fact of the personation.

The Court will grant a new trial if they see no reason to believe that there has been any fraud on the part of the applicant.

A son appearing for his father as a juryman, being an infant, avoids the trial, if no fraud on the part of the applicant.

(*h*) OF THE VERDICT. See also tit. *Verdict.*

MAYOR OF DEVIZES, &c. *v.* CLARK, H. T. 1834. K. B. 3 *Ad. & E.* 506.

ON motion for a new trial—

The Court held, that a jury are not bound to find any other than a general verdict, although the Judge directs them to find specially as to a particular fact on which a legal question may be raised; and where they refused the Court would not disturb the verdict.

The jury are only bound to find a general verdict and not a special one.

II. RELATIVE TO SPECIAL JURORS.

(*a*) SUMMONING AND STRIKING* OF, AND SWEARING.

REG. GEN., T. T. 1824. K. B. 3 *B. & C.* 177; S. C. 4 *D. & R.* 836.

IT is ordered, that in all cases where a rule for a special jury shall have been obtained for the trial of any cause in the county of Middle-

Reg. Gen. as to summoning

* No rule for a special jury can be granted on behalf of any defendant (or plaintiff in replevin), except on an affidavit, either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice

special jurors, and giving notice.

sex, and notice for summoning the same shall be given, such notice, together with the distringas, shall be left at the office of the sheriff of the said county before seven o'clock in the evening next but one before the day on which such jury shall be required to attend, unless such jury shall be required to attend on a Monday, and then before seven o'clock in the evening of the preceding Friday; and that all notices of countermand for summoning special juries shall be left at the said office before twelve at noon of the day immediately preceding the day for which the jury was to have been summoned.

(*b*) Rule for,* when to be applied for.

Thorne *v.* Marquis of Londonderry, M. T. 1831. C. P. 8 *Bing.* 26; S. C. 1 *M. & Scott*, 62.

After a cause entered and trial postponed, the Court will grant a rule for a special jury, under terms.

The defendant had obtained a rule for a special jury, after the cause (entered as a common one) had been twice called on, late in the day, and postponed.

The Court, on terms, allowed the defendant to retain his rule for a special jury.

(*c*) Duty of party obtaining.

Chuck *v.* Harris, M. T. 1840. C. P. 9 *D. P. C.* 68; S. C. 2 *Scott, N. S.* 82; S. C. 1 *M. & G.* 940.

A party who obtains a rule for a special jury is bound to use due diligence for their attendance.

The rule for a special jury had been obtained at chambers by the defendant on the 4th of November, with an appointment to nominate on the 5th. The plaintiff, however, did not attend that appointment, and a new appointment was taken out for the following day, the 6th. The defendant then became entitled to a list of the special jury, and gave notice to the plaintiff of an appointment to reduce the jury on the 9th of November. This appointment was not attended by the plaintiff, and a new appointment was taken out for the 10th. Notice of trial had been previously given by the plaintiff for Wednesday, the 11th of November, the first sittings in term.

has been given; and, in the latter case, no such rule is to be granted, unless such application is made for it more than six days before that day, provided that a Judge may, on summons, order a rule for a special jury to be drawn up at any time. (Reg. Gen., 1837, Q. B., C. P. and Ex., H. T., 4 Bing. N. S. 366; 3 Nev. & P. 1; 5 Scott, 477; 6 Dowl. P. C. 394; 3 Mee. & W. 154). Where a special jury had been obtained by the plaintiff, but from some mistake they had not been properly summoned, and seven only attended:—Held, that the plaintiff might still proceed, it being competent and a usual practice for both parties to summon a jury in order to secure their attendance. (*Snook* v. *Southwood*, 1826, N. P., 1 R. & Moo. 429). The usual rule having been obtained for a special jury by the defendant, a Judge at chambers, upon the statement of the plaintiff's attorney, without affidavit ordered a special jury to be struck next day. The Court refused to set aside that order as being irregular. (*Joseph* v. *Perry*, E. T. 1835, Ex., 3 D. P. C. 699). A special juror objected to being sworn, and stated that he was of the persuasion of a Quaker, but not a member of the Society of Friends. He was allowed to affirm. (*Emmett* v. *Norton*, 1838, N. P., 8 Car. & P. 506).

* The Court will not discharge the rule for a special jury, upon a suggestion that it has been obtained for the mere purpose of delay, and that the defenda nt has no real defence. (*Bull* v. *Pinkers*, H. T. 1838, C. P., 5 Scott, 617).

Per Cur.—The general rule is, that the party who obtains an order for a special jury must use the utmost diligence to get the jury ready by the time for which notice of trial has been given.

ANDREWS *v.* THORNTON, M. T. 1831. C. P. 8 *Bing.* 64; S. C. 1 *M. & Scott,* 139.

THE defendant, after notice of trial, served a rule for a special jury on 31st January, and the cause stood for trial in July. The defendant having never struck his jury—

The Court discharged the rule, but without costs.

Where rule obtained, but not acted upon, the Court will discharge it, but without costs*.

(*d*) OF THE TALES†.

(*e*) CERTIFICATE FOR‡.

CLEMENTS *v.* GEORGE, M. T. 1826. C. P. 11 *Moore,* 510.

THE 24 Geo. 2, c. 18, s. 1, gives the power of certifying for costs of a special jury only to the Judge after trial.

The Court held, therefore, that the Judge had no power, where the record was withdrawn.

A Judge can only certify for a special jury after trial, and not where the jury is withdrawn;

WOOD *v.* GRIMWOOD, E. T. 1830. K. B. 10 *B. & C.* 699.

THE stat. 6 Geo. 4, c. 50, enacts, "That the party who shall apply for a special jury shall pay the costs occasioned thereby,

or a nonsuit at the opening of the plaintiff's case§.

* Court will not discharge a rule for a special jury, merely on the ground that it was obtained for delay. (*Bull* v. *Pinkers,* H. T. 1838, C. P., 5 Scott, 617). If a defendant, for the purpose of delay, obtains a rule for a special jury, the Court will permit him to have it tried by such a jury, but will compel him to try it in its order, pursuant to the notice of trial, although on the day when the usual practice is not to take special juries. (*Bush* v. *Pring,* M. T. 1840, B. C., 9 D. P. C. 180).

† Where only a part of the special jury appear, the plaintiff is entitled to pray a tales without the defendant's consent. (*Gatliffe* v. *Bourne,* 1837, N. P., 2 M. & Rob. 100). In a prior case it was held, that, in a special jury cause, the plaintiff's counsel cannot have a tales without the consent of the counsel for the defendant. (*British Museum* v. *White,* H. T. 1828, N. P., 3 C. & P. 289). Semble, that, in an information at the suit of the Attorney-General, a tales may be prayed for the Crown without his warrant, though he be not present, but not for the defendant. (*Attorney-General* v. *Parsons,* M. T. 1836, Ex., 2 M. & W. 28). Under 7 & 8 Will. 3, c. 32, s. 3, talesmen can only be taken from such persons as are summoned as jurors, and not from the bystanders; nor can the Judge at Nisi Prius order other jurors to be summoned; (*Rex* v. *Hill,* 1825, N. P., 1 C. & P. 667); nor can jurors summoned on the Crown side serve as talesmen on civil issues. (*Rex* v. *Tipping,* 1825, N. P., 1 C. & P. 668).

‡ Semble, that an action for a libel in a newspaper is a fit case to be tried by a special jury, if there be special pleas of justification, but not if the general issue only be pleaded; (*Roberts* v. *Brown,* M. T. 1834, N. P., 6 C. & P. 757; but where a case turned solely on a question of law, and there was no fact in dispute between the parties, the Lord Chief Justice refused to certify for the special jury: (*Wemys* v. *Greenwood,* M. T. 1827, N. P., 2 C. & P. 483): and where, on account of the witnesses not appearing on their subpœnas, the plaintiff is nonsuited in an action for penalties, the Judge cannot certify for a special jury merely on view of the record, or the names and rank of the witnesses. (*Orme* v. *Crockford,* M. T. 1824, N. P., 1 C. & P. 537).

§ But see 3 & 4 Will. 4, c. 42, post, p. 432.

unless the Judge before whom the cause is tried shall, immediately after the verdict, certify."

The Court held, that a defendant, who had applied for a special jury, was not entitled to the costs of that jury, where the Judge who tried the cause nonsuited the plaintiff on his opening.

(*f*) Costs of*, and fee to†.

Morison *v.* Harmer, M. T. 1837. C. P. 5 *Scott*, 411.

If one issue be found for the plaintiff and another for the defendant, neither party is entitled to the costs.

On motion for the costs of a special jury—

The Court held, that neither party is entitled to the costs of a special jury, where one issue is found for the plaintiff, and the other for the defendant.

III. RELATIVE TO THE GRAND JURY‡. See, also, tit. *Indictment.*

Rex *v.* March, H. T. 1831. K. B. 1 *N. & P.* 187.

The minority of the grand jury finding a true

On motion to quash an indictment, it appeared that the defendant was aware of the mode in which the bill had been found by the grand jury, pleaded to it, and was found guilty.

* By 3 & 4 Will. 4, c. 42, s. 35, "Whereas it is provided, in and by a statute passed in the reign of his late Majesty, intituled, 'An Act for consolidating and amending the Law relative to Jurors and Juries,' that the person or party who shall apply for a special jury shall pay the fees for striking such juries, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the Judge before whom the cause was tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury. And whereas the said provision does not apply to cases in which the plaintiff has been nonsuited, and it is expedient that the Judge should have such power of certifying as well when a plaintiff is nonsuited as when he has a verdict against him, be it therefore enacted, that the said provisions of the said last-mentioned act of Parliament, and everything therein contained, shall apply to cases in which the plaintiff shall be nonsuited, as well as to cases in which a verdict shall pass against him."

† Where the defendant struck the special jury, but took no steps to summon them, and the plaintiff, to insure the trial, did so:—Held, that it was nevertheless a jury, and he was liable to pay them. (*Wilson* v. *Butler*, 1837, N. P., 2 M. & Rob. 78). If a defendant, in an action of replevin, which is made a special jury cause, withdraws his avowries, and the Judge directs him to pay "all costs," that will not include the costs of the special jury. (*Bell* v. *Tainthorp*, E. T. 1834, B. C., 2 D. P. C. 518).

‡ If one of the grand jurors be a Quaker, the indictment should commence, "The jurors for our lady the Queen upon their oath and affirmation present" &c. (*King, In re*, 1839, N. P., 9 C. & P. 78). The grand jury had come into court, and had been discharged, and had left the court, but had neither left the building nor separated. The Judges directed them to be sent for back into court, and directed another bill of indictment (the witnesses on which were going abroad) to be sent before them. (*Reg.* v. *Holloway*, M. T. 1839, C. C. C., 9 C. & P. 43). The Court will not compel the prosecutors to give a list of their names to the defendant previous to striking a special jury, but will give such directions by consent of the prosecutors, as shall prevent prejudice accruing to the defendant in consequence of such list not being furnished. (*Reg.* v. *Nicholson*, E. T., 1840, B. C., 8 D. P. C. 422). Where, after the jury had been discharged,

The Court afterwards refused to quash the indictment, on the ground that twenty-five grand jurymen were sworn, and that thirteen were against the finding, as he might bring error either in law or in fact; but the Court will not receive affidavits of the jury, of what passes at the time of the finding of the bill:—Held, also, that the correct number to be sworn is twenty-three only.

bill is only a ground of error after conviction.

IV. RELATIVE TO A GOOD JURY.

CALVERT *v.* GORDON, M. T. 1828. K. B. 3 *M. & Ry.* 128.

ON the question, whether the costs of a good jury, upon execution of a writ of inquiry, under 8 & 9 Will. 3, c. 11, should be allowed—

The Court refused them, although the Judge certified that it was a proper cause to be tried by a special jury.

Before Rule H. T. 2 Will. 4, the costs of a good jury* on a writ of inquiry were not allowed.

Justice of the Peace†.

See tit. *County Rate.*

I. QUALIFICATION OF, p. 434.

II. JURISDICTION OF.

(*a*) IN GENERAL, p. 434.

(*b*) IN PARTICULAR. See tits. *Apprentice—Bastard—Highways—Poor—Sessions—Trespass.*

III. DUTY OF, p. 438.

IV. LIABILITY OF, p. 438.

V. WARRANTS BY, p. 439.

VI. OF THE CLERK TO, p. 441.

not agreeing on their verdict, there being an insufficient number remaining after challenges allowed of the original panel, the Judge ordered a new panel to be returned:—Held, that a conviction by the jury selected therefrom was good. (*Reg.* v. *Cropper*, 1837, 2 Moo. C. C. 18). Where, in a case of murder, which had occupied the whole of the day, the Judge, after he had commenced his summing up, adjourned the Court in consequence of the noise made by the crowd in the hall, his lordship ordered that two bailiffs should be sworn to keep the jury together till the next day, and that the jury should be supplied with suitable refreshment and accommodation by the high sheriff, and next day his lordship commenced his summing up of the evidence. (*Rex* v. *Clay*, 1836, N. P., 7 C. & P. 276; see 2 B. & Ald. 462).

* By Rule, H. T. 2 Will. 4, "There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a Judge, upon summons for that purpose." (H. T. 2 Will. 4). The costs of good jury are in the discretion of the Court. (*Wilkinson* v. *Malin*, M. T. 1832, Ex., 1 D. P. C. 630).

† See 2 & 3 Vict. c. 58, s. 70; c. 82, s. 93.

VII. PROCEEDINGS BY AND AGAINST.

(*a*) By Action.

1. *Notice of*, p. 441.
2. *Declaration*, p. 442.
3. *Costs*, p. 442.
4. *New Trial*, p. 442.

(*b*) By criminal information, p. 443.

(*c*) By indictment, p. 444.

(*d*) By mandamus, p. 444.

(*e*) Of a certiorari, p. 445.

I. QUALIFICATION OF*.

II. JURISDICTION OF.

(*a*) In general†.

Rex *v.* Musson, M. T. 1826. K. B. 6 *B. & C.* 74.

Justices having an exclusive jurisdiction and a concurrent county, one may commit within the latter to the county gaol;

On an indictment against the defendant, as keeper of the gaol of the county of Leicester, for a misdemeanor, in refusing to deliver up to John Brooks, one of the constables of the said borough and the liberties thereof, pursuant to an order of the court of quarter sessions of the said borough and liberties, then sitting, one Mary Lovett, then in the defendant's custody in the said gaol, for the purpose of the said Mary Lovett's being conveyed by the said John Brooks to the said court of quarter sessions of the said borough and liberties, there to take her trial upon a bill of indictment for felony found against her—

The Court held, 1st, where borough magistrates have a concurrent jurisdiction with county magistrates, they may commit to the county gaol for trial, and may command that the prisoner be brought before their borough jurisdiction for trial, provided the place within their jurisdiction, and in which the offence is charged to have been committed, contributes to the county rate; 2ndly, borough magistrates, acting exclusively for their borough, which does not contribute to the county rate, and concurrently for the liberties of the borough, which do contribute to it, may make the usual order on the county treasurer for expenses incurred on prosecutions touching offences committed within the contributory liberties.

* Where the qualification of a justice of the peace is an ecclesiastical benefice, a sequestration issued at the suit of a creditor, under which possession has been duly taken, and the profits received, is an incumbrance affecting the estate, within stat. 18 Geo. 2, c. 20, s. 1. (*Pack* v. *Tarpley*, 9 Ad. & E. 468; S. C. 1 P. & D. 478).

† If a felony be committed in that part of the county of a town which has been added to it by the Boundary Act, (2 & 3 Will. 4, c. 76), it is triable in the county of the town. (*Rex* v. *Piller*, 1836, N. P., 7 C. & P. 337).

REX *v.* JUSTICES OF GLOUCESTER, H. T. 1836. K. B. 6 *N. & M.* 115.

and the Boundary Act does not transfer to the county justices the jurisdiction which the borough justices had.

THE 8th sect. of the 5 & 6 Will. 4, c. 76, enacts, "That every place and precinct which shall be included within the metes and bounds of any borough, and none other, shall be part of such borough; and in those boroughs which are counties of themselves, shall be part of such county, and none other."

The Court held, that the statute made such places within boroughs, which are counties of themselves, part of the borough for all purposes; and that the magistrates of the county had no power to make an order for stopping up a way within any such precincts, after the passing of the act of 5 & 6 Will. 4, c. 76.

FAWCETT *v.* FOWLIS, M. T. 1827. K. B. 7 *B. & C.* 394; S. C. 1 *M. & Ry.* 102.—S. P. WEDGE *v.* BERKLEY, T. T. 1836. K. B. 1 *N. & P.* 665.

No action lies against justices primâ faeie having jurisdiction, where no objection was taken at the time of conviction.

IN an action of trespass, it appeared that the plaintiff, residing in the hamlet of A., claiming to be exempt from statute labour in the parish of J., had been convicted, under 13 Geo. 3, c. 78, s. 31, not having objected, before the justices, either to the jurisdiction or the validity of the surveyor's appointment, nor having pleaded the exemption of the hamlet—

The Court held, that, the justices having primâ facie jurisdiction, no action could be maintained against them for levying the distress consequent upon the conviction.

PENNY *v.* SLADE, E. T. 1839. C. P. 7 *Scott*, 285; S. C. 5 *Bing. N. S.* 319.

So, no action lies where they perform a judicial act, without fraud;

SEVEN borough magistrates, including the mayor, assembled to appoint overseers. The mayor drew from his pocket two blank forms, with their seals ready attached, filled them up with the names of two persons of his own political party, handed them to the two magistrates sitting next to himself, and, on their being signed, immediately dispatched them by a constable to be served. As soon as the constable had left the room, the four other magistrates, who had not observed the mayor's proceedings, requested him to nominate two other overseers, and, upon his refusing to put the question, appointed them without their concurrence. The mayor afterwards caused a distress to be levied on the plaintiff for refusing to pay a rate made by the overseers appointed by the mayor. Plaintiff sued the mayor in trespass. The jury were directed that they might find for plaintiff, if they thought the mayor's appointment of overseers to be fraudulent. The jury having found it not fraudulent—

The Court held, that the action was not maintainable, the appointment of the overseers being a judicial act, performed without fraud, at a meeting competent, in point of jurisdiction, to perform it, and the act being verified by a sufficient number of signatures to satisfy the statute regulating the mode of appointment.

REEVE *v.* POOLE, E. T. 1825. K. B. 4 *B. & C.* 155; S. C. 1 *C. & P.* 622.

and where power is given to justices to mitigate, the legislature must be taken to have given general jurisdiction.

IN an action for penalties under the 47 Geo. 3, c. 68, s. 33, which enacts, "That if any vendor of coals shall knowingly sell one sort of coals for a sort which they really are not, he shall forfeit, for every such offence, 20*l.* per chaldron for every chaldron so sold." By sect. 146, all penalties not exceeding 20*l.* are to be sued for before a justice of peace.

The Court held, that it was not a matter within the jurisdiction of the magistrates, as in cases upon s. 17, where the justices have the power of mitigating. Wherever that power is given, it is a general rule that the legislature must be taken to have intended to place the matter under the jurisdiction of the justices.

KITCHEN *v.* SHAW, E. T. 1837. K. B. 1 *N. & P.* 791.

The 4 Geo. 4, c. 25, does not apply to masters and household servants; hence, justices cannot adjudicate*.

IN trespass, it appeared that the plaintiff, a young woman under age, had contracted with one C. B. to serve him as a house-servant, and entered into his service under such contract; and afterwards having absented herself from his service, and refused to complete the contract, was committed to prison for a month by the defendant, a justice of the peace, under the authority of the 4 Geo. 4, c. 25. Upon this statement, Lord *Abinger*, C. B., nonsuited the plaintiff, holding the defendant had jurisdiction; but—

The Court held, that the jurisdiction of magistrates, under 4 Geo. 4, c. 25, did not extend to domestic servants, and granted a new trial.

REGINA *v.* TRAILL, M. T. 1840. Q. B. 4 *P. & D.* 325.

Where justices gave possession under the 11 Geo. 2, which the Judge at the assizes set aside:—Held, that the justices had no power to restore;

TWO justices had given possession of premises to a landlord under 11 Geo. 2, c. 19, s. 16, and the tenant having appealed, under sect. 17 of the same act, to the justices of assize, the latter had made an order directing "restitution to be made" of the premises to the tenant.

The Court held, that a mandamus would not lie to compel the justices who gave possession to cause restitution to be made.

REX *v.* TREGARTHAN, M. T. 1833. K. B. 2 *N. & M.* 379; S. C. 5 *B. & Ad.* 678.—S. P. REX *v.* HOLLOWAY, E. T. 1834. B. C. 2 *D. P. C.* 525.

but with respect to recognizances for

ON a rule to shew cause why the recognizance to keep the peace towards Mr. Matthews, which had been entered into by the defendant and his sureties, should not be discharged, or why the amount

* Where a commitment, under the 4 Geo. 4, c. 34, s. 3, recited that A. B. contracted to print certain pieces of woollen cotton goods, and adopted such contract, and entered into the service of C. D. under such contract, and refused to perform such contract, wherefore the justices adjudged that the said A. B. be delivered unto the keeper of the house of correction, there to remain and be corrected, and held to hard labour for the space of six weeks:—Held, that contracting to print certain pieces of woollen cotton goods was not contracting to serve within the meaning of the act; that the magistrates had not jurisdiction; and that the party must be immediately discharged on habeas corpus. (*Ex parte Johnson*, T. T. 1839, B. C., 7 D. P. C. 702).

of the recognizance should not be reduced, and for a certiorari to remove the recognizance and information taken, the case of *Rex* v. *Harper* (1 Chit. Rep. 491) was relied on.

keeping the peace, the Court will not interfere.

Per Cur.—That case was very different from the present. We cannot interfere with the discretion of the justices of the peace.

CAVE *v.* MOUNTAIN, E. T. 1840. C. P. 1 *Scott, N. S.* 132; S. C. 1 *M. & G.* 257.

A PARTY had been brought before a magistrate on a charge of felony in cutting certain trees, and no evidence had been given as to the value of the trees cut, which, under the 7 & 8 Geo. 4, c. 30, s. 19, to constitute the act a felony, should exceed a certain sum—

A justice may remand for a reasonable time; what is a reasonable time is a question for the jury*;

The Court held, that the committal of the party by a magistrate does not make him a trespasser by acting without jurisdiction, inasmuch as the charge is one of felony, over which the magistrate has jurisdiction:—Held, also, whether the time for which a party has been re-committed for further examination is unreasonable, is a question for the consideration of the jury, and is to be determined by their decision.

DAVIS *v.* CAPPER, M. T. 1829. K. B. 10 *B. & C.* 28.

IN an action of trespass against a justice, it appeared that the defendant had committed the plaintiff for fourteen days for re-examination, although the jury found that it was done bonâ fide and without any improper motive, yet that it was for an unreasonable time.

if unreasonable, trespass lies.

The Court refused to enter a nonsuit; and said, a magistrate may commit for re-examination a party charged with felony, but he cannot do so arbitrarily or for an unreasonable time; and what shall be considered reasonable is a mixed question of law and fact for the consideration of the Judge and jury; a commitment for an unreasonable time is wholly void, and trespass therefore lies against the magistrate.

CROPPER *v.* HORTON, H. T. 1827. K. B. 8 *D. & R.* 166.

IN an action for trespass and false imprisonment against a justice—

Assuming a justice has power to commit a witness for refusing to give evidence, the party ought to be apprised of the specific charge.

The Court held, that, assuming that he had power to commit a person refusing to give evidence where a specific charge is made, before the party can be brought into contempt he ought to be fully apprised that there is such charge under inquiry before the justice; and where both the warrant and the evidence were silent upon that point, the Court refused to disturb the verdict which had been found

* Two constables on a Monday morning were taking the plaintiff before a magistrate on a charge of misconduct, when they met the magistrate, who desired them to take the plaintiff back to the lock-up, and bring him up for examination on the Tuesday. They did so, when the magistrate fined him *1l.*:—Held, that the magistrate was liable to an action of trespass for sending the plaintiff back to the lock-up; and that it was the duty of the magistrate, either to have gone into the case on the Monday, or to have desired that the plaintiff should be taken before another magistrate. (*Edwards* v. *Ferris*, 7 C. & P. 542). Held, also, that, under a notice of action against the magistrate for imprisonment, the plaintiff might give evidence of the circumstances under which he was taken into custody, and of what took place before the magistrate on the Tuesday; but that he could not give evidence of a declaration made a month before by one of the constables. (*Ib.*)

for the plaintiff, and, considering the circumstances did not raise the general question, abstained from giving any opinion on that point.

See 3 *M. & S.* 1.

REX *v.* COPE, H. T. 1837. K. B. 7 *C. & P.* 720; 1 *N. & P.* 515; S. C. 6 *Ad. & E.* 226.

The 4 Geo. 4, c. 64, (Gaol Act), does not preclude justices of Middlesex committing prisoners to Newgate.

THIS was an indictment against the keeper of the gaol of Newgate for refusing to receive prisoners committed by the justices of the peace for the county of Middlesex charged with misdemeanors. It appeared that the gaol of Newgate is the county gaol of Middlesex, and the justices of the peace of that county, before and until the year 1826, had been in the habit of committing persons charged with felonies and misdemeanors to that gaol.

The Court held, that the mayor and aldermen of the city of London were not authorized by the 4 Geo. 4, c. 64, to make any orders for the regulation of the gaol of Newgate, which would prevent justices of the peace for the county of Middlesex from committing persons charged with misdemeanors to that gaol.

III. DUTY OF*.

DAUBNEY *v.* COOPER, M. T. 1829. K. B. 10 *B. & C.* 237.

A justice who is acting judicially must not make his proceedings private.

MAGISTRATES sitting judicially ordered an attorney, who attended on behalf of the accused, to be turned out of the room.

The Court held, that (independent of any question as to his right as an attorney) he was entitled to maintain an action of trespass for being thus turned out, on the ground of right as one of the public to be present. In general the Court in which magistrates are sitting judicially is an open court, to which the public have a right of access; and supposing there to be room, that a person conducts himself properly, and there be no reason to justify an order for his removal, every one of the public has a right to be present.

IV. LIABILITY OF.

MILLS *v.* COLLETT, M. T. 1829. C. P. 6 *Bing.* 85; S. C. 3 *M. & P.* 242.

A justice who commits, in the absence of malice, is not liable.

A JUSTICE committed a party charged (under 7 & 8 Geo. 4, c. 30) with cutting down a tree growing on premises in his own occupation belonging to another person.

* Semble, that, on deciding a case, magistrates ought not to take an indemnity, as it has the effect of enabling them to decide more safely in favour of a party who is able to give an indemnity than of one who cannot do so. (*Selwood* v. *Mount*, 9 Car. & P. 75). It is improper to take the examination of witnesses first and then swear them to the truth. (*Rex* v. *Kiddy*, K. B., 4 D. & R. 734). Where a magistrate has exercised his discretion by refusing to convict on the evidence adduced before him in support of an information, the Court will not compel him to rehear the case or return the proceedings which had taken place before him. (*Ex parte the British and Foreign Invention Company*, 7 Dowl. P. C. 614). It is the duty of magistrates in all cases to commit an accomplice, and not to admit him to bail, notwithstanding it may be intended to call the accomplice as a witness on the trial. (*Rex* v. *Beardmore*, 1836, N. P., 7 C. & P. 497).

The Court held, that, in the absence of all proof of malice, he could not be charged as having acted without jurisdiction and liable in an action of trespass and false imprisonment; if the trees were excepted in the lease the tenant might be a trespasser, and if liable in trespass it is by no means clear he might not be liable criminally.

PIKE *v.* CARTER, E. T. 1825. C. P. 3 *Bing.* 78.

THE treasurer of a benefit society brought trespass against a magistrate for signing a warrant of distress, under which monies, collected from the society and vested in the plaintiff as treasurer, were forcibly taken from his custody; and it appeared that an order of magistrates having been signed for the relief of a member in pursuance of the stat. 33 Geo. 3, c. 54, s. 15, the treasurer appeared to answer the matters of the complaint, which was heard on oath, but he made no defence.

And a justice acting at the request of one party, and the other not objecting to his interference, is not liable for an order made by him*.

The Court held, that trespass could not be maintained against the magistrate for signing a warrant of distress in pursuance of such order, as his jurisdiction to act was not questioned at the time, nor was a rule of the society presented to his notice, whereby disputes between the members were to be referred to arbitration, and which was confirmed by the 10th section of the stat. 33 Geo. 3, which made such award binding and conclusive on all parties, without being subject to the control of the magistrates.

V. WARRANTS BY JUSTICES OF. See also post, tit. *Warrant.*

REX *v.* STAFFORD, T. T. 1835. K. B. 5 *N. & M.* 94; S. C. REX *v.* HUGHES, T. T. 1835. K. B. 3 *Ad. & E.* 425.

RATES were imposed by a local paving act, and an appeal given to the commissioners, and from them to the sessions; and in case of refusal it was enacted, that, in case any person should neglect to pay his rate for seven days after demand, it should be lawful for any justice, upon proof on oath of such demand and non-payment by warrant to authorize the collector to levy the rate by distress and sale of the goods of the person rated, and in case there should be no distress to commit the party to gaol.

Where an act enables a justice by warrant† to authorize a distress, it is not obligatory on him to do so without a previous summons.

The Court held, that it was not obligatory on the justices to issue such warrant without a previous summons, and a rule for a mandamus discharged with costs.

PAINTER *v.* LIVERPOOL GAS COMPANY, H. T. 1835. K. B. 3 *Ad. & E.* 433.

BY statute establishing a Gas Light Company, it was enacted, "That if any person should refuse or neglect, for ten days *after de-*

In fact it seems illegal to issue

* A magistrate meeting a constable with a party in charge is liable in trespass if he order him back to the lock-up; he is bound either to hear the case at once or order the prisoner before another justice. (*Edwards* v. *Ferris*, 1836, N. P., 7 C. & P. 542).

† A warrant of a justice of the peace to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such party, is good. (*Rex* v. *Stokes*, 1831, N. P., 5 C. & P. 148).

a distress warrant without a previous summons.

mand, to pay any rent due from him to the company for the supply of gas, such rent should be recovered by the company or their clerk, by warrant of any justice of the peace for the town, &c., and it should be lawful for the company or their clerk, or any person acting under their authority, with such warrant to levy the sum so due by distress and sale of the goods of the party so neglecting or refusing to pay, or the same might be recovered by action," &c.

The Court held, that a warrant so issued by a justice, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the act.

HUTCHINSON *v.* LOWNDES, E. T. 1832. K. B. 1 *N. & M.* 574; S. C. 4 *B. & Ad.* 118.

The warrant must be in writing.

A LABOURER, to enforce payment of a week's wages, applied to a justice of the peace under 5 Geo. 4, c. 18, who granted a summons, requiring the plaintiff to appear the same day before the justices of the borough of C. The plaintiff appeared in obedience to the summons, but refused to pay the money; the justices ordered the plaintiff verbally to stand committed.

Per Cur.—The statute says, it shall be lawful for the parties "to issue forth their warrant for committing" the offender; and it is provided that the amount of costs and charges shall be specified in *the warrant*. The statute therefore directs the commitments to be by warrant in writing. In Hawkins's Pleas of the Crown it is laid down that a commitment must be in writing, under the hand and seal of the justices committing.

ATKINS *v.* KILBY, E. T. 1840. Q. B. 11 *Ad. & E.* 777; S. C. 4 *P. & D.* 145.

Under a justice's warrant the constable is not bound to take the sum tendered; and if the copy of the warrant be produced and not objected to, that is sufficient.

AN order of filiation having been made on the plaintiff by the justices of H., which not being complied with after a month's indulgence, a warrant of commitment issued, which being indorsed by the justices of D., the plaintiff was taken from D. to the bridewell of W., in the county of H.

The Court held, that the constable executing the warrant was not bound to accept the sum ordered, when tendered by the prisoner, and discharge him; the warrant having been retained by the gaoler at W., and, upon a copy of it and perusal of the original being required, the party having been informed of such retainer, no objection was made to its non-production, but a copy received; held to amount to a dispensing with the production, and an irregularity in the warrant going to question the jurisdiction of the justices held not to deprive the constable of the protection given him by 24 Geo. 2, c. 44, s. 6.

EVANS *v.* REES, T. T. 1840. Q. B. 4 *P. & D.* 32.

A justice's warrant against a witness for not appearing "to attend and find sufficient bail for his appearance at the assizes" is illegal.

A JUSTICE granted a summons, by which W. E., alleged to be a material witness in the case, was summoned to appear and testify before him. It being represented to the justice that W. E. refused to appear, he granted a warrant, which recited that it had been proved on oath that the summons had been duly served, and that the party had refused to appear, and commanded the constables "to bring the said W. E. before me, or some other of her Majesty's

justices, &c., to find sufficient bail to appear and give his evidence at the next assizes." In an action for false imprisonment by W. E.—

The Court held, that the magistrate had no jurisdiction to issue such a warrant.

VI. OF THE CLERK TO.

SANDYS, *Ex parte*, E. T. 1833. K. B. 1 *N. & M.* 591; S. C. 4 *B. & Ad.* 863.

The justices' clerk, appointed by petty sessions, may be summarily discharged.

ON motion for a mandamus to restore A. B. to the office of justices' clerk. The applicant, having been for many years clerk to the magistrates, had been by them dismissed from the situation, without any reason being assigned for such dismissal—

Per Cur.—We cannot interfere. The clerk to the justices has no interest in his office. It is merely an office at the pleasure of the magistrates, and resembles that of a vestry clerk.

VII. PROCEEDINGS BY AND AGAINST.

(*a*) BY ACTION*.

1. *Notice of.* See also, ante, tit. *Notice of Action.*

JONES *v.* SIMPSON, M. T. 1830. Ex. 1 *C. & J.* 174; S. C. 1 *Tyrw.* 32.

Notice of action to a justice, in an action against himself, will authorize issuing process against him and the constable jointly.

IN trespass against one defendant, a magistrate, and another, a constable, it appeared that the notice of action given to the magistrate did not express that it was the plaintiff's intention to join the constable as a defendant with the magistrate.

The Court held, that when a notice is given of an intended writ against a magistrate, a writ may be sued out against him and another. The law appears expressly to have been decided. It is impossible to distinguish *Agar* v. *Morgan* (2 Price, Rep. 126) from the present case. It was there decided that a notice of action against one would support an action subsequently brought against him and others for a joint trespass. Now, if a writ against a magistrate and another is not within a notice of a writ against the magistrate, then the notice in that case would not have been a notice of action against the party as then sued with others, and though that case turned on another act, yet it was illustrated, and the judgment of the Court proceeded on the analogy to cases under the statute now under consideration here.

* A justice is liable in trespass if he commit a person for disobedience to an order which turns out to be invalid. (*Wilkins* v. *Hemsworth*, M. T. 1837, K. B., 3 Nev. & Per. 55). If a party make a complaint of another to a magistrate, in a matter over which he has a general jurisdiction, who thereupon issues his warrant, by force of which an arrest is made, neither the party complaining nor the magistrate is liable in trespass; and the only remedy for the party aggrieved is in case for malicious prosecution. But if the matter were one in which the magistrate had no jurisdiction at all, then the latter is a trespasser. (*West* v. *Small*, H. T. 1838, Ex., 3 M. & W. 418).

2. *Declaration.*

JONES *v.* EDWARDS, H. T. 1838. Ex. 6 *D. P. C.* 369; S. C. 3 *M. & W.* 218.

A declaration against a magistrate for acting without qualification may be amended.

THIS was an action brought to recover a penalty of 100*l.* from the defendant, for having acted as a magistrate for the county of Merioneth without a proper qualification. The action was commenced on the 6th of October, and the venue laid in Middlesex. The defendant pleaded the general issue on the 4th of November, on the 8th a notice of trial was delivered, which was countermanded on the 10th, on information that the venue was improperly laid. On the 18th, after summons, the plaintiff having leave to amend his declaration in this respect, and the defendant having also leave to plead de novo, on the 22nd delivered a special demurrer, alleging as grounds that the declaration merely stated that the defendant had acted as a justice, without setting out any times or places, or specific acts which he had performed. On the 28th, a week's time was obtained to join in demurrer, and then another week's time. On the 7th of December the plaintiff took out a summons to amend his declaration, but the application was refused at chambers by *Gurney*, B.

Per Cur.—We think this amendment may be allowed.

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3. *Costs.*

THOMAS *v.* SAUNDERS, T. T. 1834. K. B. 3 *N. & M.* 572.

If the venue be changed on the plaintiff paying costs, and the defendant obtains a verdict, he is not entitled to double the extra costs*.

THE venue in an action against magistrates for improperly issuing their warrant and imprisoning the plaintiff, was changed on the terms of the plaintiff paying all the extra costs.

The Court held, that the defendants, having obtained the verdict, were not entitled under 7 Jac. 1, c. 5, to double such extra costs, and the plaintiff having only on the day before the commission day given notice that the cause would not be tried until the usual day of trying special jury causes, held too late to save the costs of the witnesses going there before that day; and semble the defendants were not bound to pay any regard to such notice.

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4. *New Trial.*

PENPRASE *v.* JOHNS, M. T. 1833. K. B. 2 *N. & M.* 376.

After a verdict for a justice, the Court will not grant a new trial on a point which might have been raised in the former.

IN an action against justices for issuing a warrant of distress upon a regular conviction, an objection to the warrant, as bad on the face of it, in not stating the jurisdiction, having been taken and overruled, a verdict by consent passed for him—

The Court refused a new trial, in order to enable the plaintiff to avail himself of the objection, as it might have been pressed on the former trial.

* Where an action against justices is discontinued, no rule for a suggestion for costs is necessary. (*Fosbrooke* v. *Holt*, H. T. 1836, Ex., 1 Tyrw. & G. 464; S. C. 4 D. P. C. 700).

(*b*) By criminal information.

Rex *v.* Heming, M. T. 1833. K. B. 2 *N.* & *M.* 477.

Before moving for a criminal information against a magistrate, notice must be given.

On motion for a criminal information, it appeared from the affidavits that the defendant was a magistrate, and the charges against him were in his capacity of justice of the peace; but that the usual notice of motion, which, by the practice of the Court is required, had not been given—

The Court refused to interfere.

Fentiman, *In re,* M. T. 1834. K. B. 4 *N.* & *M.* 126; S. C. 2 *Ad.* & *E.* 129.

A justice is entitled to six days' notice before action for criminal information, and two days' notice before the term will not do.

On motion for a criminal information against a magistrate, it appeared that notice was given on the 31st of October, that the Court would be moved on the first day of term, or as soon after as counsel could be heard—

Per Cur.—The rule requiring six days' notice to the magistrate before an application of this description is made has not been complied with. The notice was given on the 31st of October that a motion would be made on the first day of term, or as soon after as might be; now, certainly, more than six days have in point of fact elapsed between the giving of the notice and the making of the motion, but that is not sufficient.

Rex *v.* Cummins, T. T. 1827. K. B. 8 *D.* & *R.* 344.

Criminal information against a justice refused where no sufficient evidence of malicious or corrupt motives shewn*.

Rule for a criminal information against a magistrate convicting the prosecutor on the game laws, he not having been personally served with any summons, and his attorney, who attended for him, having been prevented cross-examining the witnesses—

The Court refused the rule, on the ground of there not appearing sufficient evidence of malicious or corrupt motives; but, upon payment of costs by the defendant, the Court highly disapproving of the practice amongst justices of hearing evidence in such cases in the absence of the party accused.

Rex *v.* Byrne, M. T. 1837. K. B. 6 *D. P. C.* 36; S. C. 2 *N.* & *P.* 152.

An affidavit in support of a criminal information for slander must not contain

On motion for a criminal information by a justice of the peace for slander spoken to him, it was objected, that the affidavit supporting the rule contained a quantity of matter slanderous of the defendant. That was a ground for excepting to the affidavit; and in slandering bail, (1 Chit. Rep. 676), the Court of King's Bench held, that

* A libel stated that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and upon this imputed neglect of duty to the magistrates:—Held, that, on the trial of a criminal information for this libel on the magistrates, the defendant's counsel, with a view of shewing that the libel did not succeed the bounds of free discussion, could not go into evidence to prove that there was in fact a riot and that a pistol was in fact fired at the people. (*Rex* v. *Brigstock*, 1833, N. P., 6 C. & P. 184).

slanderous and intemperate language*.

affidavits containing general slanderous statements, injurious to the character of bail, cannot be received.

Lord *Denman*.—The prosecutor here has introduced terms and expressions in his affidavit impertinent to the case. It ought clearly to be understood that parties applying for a criminal information should confine themselves to the simplest statement of facts, and never introduce the slightest intemperance of language.

(*c*) By indictment.

Rex *v.* Pinney, 1832. K. B. 3 *B. & Ad.* 947; S. C. 5 *C. & P.* 254.—S. P. Rex *v.* Kennett, 1781. K. B. *Id.* 282, *n.*

On an indictment against a justice for non-performance of his duty, the question is, whether he did under the circumstances all that could be expected from a man of ordinary firmness†.

On an information against the defendant, a magistrate, for neglect of duty—

Littledale, Parke, and *Taunton,* Js., held, that a magistrate in cases of riots may call on and arm the king's subjects, but he is not bound to head or accompany the military, nor to do more than give them orders; and the question in all cases is, whether he did under the circumstances all that could be expected from a man of ordinary firmness; and in order to find him guilty of any specific act of neglect all the jury must agree in the same act of neglect.

(*d*) By mandamus. See, also, tit. *Mandamus.*

Rex *v.* Twyford, M. T. 1836. K. B. 5 *Ad. & E.* 430.—S. P. Rex *v.* Sillefont, M. T. 1835. K. B. 4 *Ad. & E.* 354.

If the power to be exercised by a justice be doubtful, a mandamus will not lie‡;

Under stat. 17 Geo. 3, c. 56, ss. 1, 2, 20, 22, two justices may convict and sentence to imprisonment, and the party convicted may appeal to sessions, giving notices to the justices at the time of conviction, and at the same time entering into recognizances, with sufficient sureties, to try the appeal and abide the judgment of sessions; but if he do not, at such time, enter into such recognizance, the convicting justices are to commit him till the sessions, unless such recognizance be sooner entered into, and are to transmit the conviction to the sessions, on proof of notice of appeal; and on recording the conviction are to hear the appeal; and if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the

* An affidavit, stating that the defendant did print and publish a newspaper, called &c., a copy of which is annexed, is insufficient. (*Reg.* v. *Baldwin,* 3 N. & P. 342; abridged, post, tit. *Libel*).

† A magistrate is not culpable in not having called out the posse comitatus, if he have given reasonable and timely warning to the subjects to come to his assistance, nor for not calling out and compelling special constables to be sworn in, unless it be distinctly and clearly proved that information was laid before him of an impending or actual riot. (*Rex* v. *Kennett,* 5 C. & P. 282).

‡ Where an application for a license has been heard and refused, the Court will not grant a mandamus for them to re-hear the application. (*Rex* v. *Justices of Farringdon Without,* 4 D. & R. 725).

time of affirmance, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation. A party convicted by two justices, and sentenced to eleven weeks' imprisonment, gave notice of appeal, and was committed for not entering into recognizance. By the practice of sessions, the appeal is to be entered, and the order for hearing it obtained by the party disputing the conviction. The party not having entered the appeal, the sessions discharged him.

The Court thought that the convicting magistrates had no longer power to commit in execution of the conviction; but held, that, at any rate, no mandamus should be granted to compel them to do so, as the power to be exercised was doubtful.

REX *v.* JUSTICES OF CUMBERLAND, H. T. 1836. K. B. 4 *Ad. & E.* 695.

but it will lie to compel them to hear a complaint arising out of a marriage at Gretna Green.

ON complaint against a party as a vagrant, for refusing to maintain his wife, the party charged being called upon by the justices in petty sessions to shew cause for his refusal, denied being married to the woman, and produced some evidence in support of such denial, and he threatened the magistrates with an action if they commited him. The complainants offered evidence of a Gretna Green marriage, but the justices refused to hear it, and dismissed the summons, saying, that they would not, on this application, try a disputed marriage, alleged to have taken place out of the country, and that the parties ought to try it in the Ecclesiastical Court.

The Court held, that the justices could not, under these circumstances, refuse to hear the case through; and a mandamus was granted, requiring them to hear the complaint.

(*e*) OF A CERTIORARI.

REX *v.* FLOUNDERS, E. T. 1833. K. B. 1 *N. & M.* 592; S. C. 4 *B. & Ad.* 865.

A notice to justices of an intended motion for a certiorari must be six days before motion made.

A NOTICE of the applicant's intention to move for a certiorari to remove a justice's order was served on the 11th January, 1833, on the magistrate, and was as follows: "I do hereby give you notice that I shall, on the first day of next Hilary Term, or as soon afterwards as I can be heard, move his Majesty's Court of King's Bench for a rule calling upon you to shew cause why a writ of certiorari should not issue, directed to you, and calling upon you to certify, and remove into the said court, a certain order of allowance" &c.

Per Cur.—The notice is insufficient. Justices are entitled to six days' notice of the intention to move; but, consistently with the terms of this notice, the prosecutor might have moved on the following day.

King's Bench Prison*.

OSBORNE *v.* ANGLE, M. T. 1835. C. P. 4 *D. P. C.* 342; S. C. 2 *Bing. N. C.* 318.

The Marshal has authority to confine in the strong room a debtor charged with felony.

ON a rule calling on the warden of the Fleet to shew cause why the defendant should not be removed from the strong room of the prison, in which he was then confined, and allowed to occupy the interior of the prison, in common with the other prisoners, it appeared that a warrant had been sent to the prison, directed to the warden, and purporting to be issued by the lord mayor, requiring the warden to keep the defendant in close custody, as he had been charged before the lord mayor with forging the acceptance of a bill of exchange. Upon the receipt of this warrant the warden took no measures to bring the defendant before the lord mayor, but removed him from the part of the prison he before occupied to the strong room.

Per Cur.—It appears to us that no more has been done than was necessary for the safe custody of the defendant, and the liberty and enjoyment of the other prisoners. The strong room has been made under a Rule of this Court, and we find from the evidence of the officer, whose duty it is from time to time to be in the room, that it is commodious and dry. The Rule directs the room to be made for persons endeavouring to make their escape, and the question is, whether the warden is bound to wait until the party has actually attempted his escape, or whether there is such a state of circumstances that the party is willing to escape if no restraint be put upon him. In the present case the warrant charges him with felony. That is not a mere idle charge: it must have been founded upon depositions taken on oath before the magistrate who granted the warrant. The consequence is, that a person with such a charge hanging over him stands in a different situation from the other debtors.

REG. GEN. H. T. 1827. K. B. 6 *B. & C.* 267.

The Marshal or his officers has no right to sell any article to a prisoner.

IT is ordered that no officer of the King's Bench prison, or any of the persons employed by the Marshal therein, in the management or superintendence of the prison or prisoners, shall, either directly or indirectly, be concerned in selling any article to, or doing any work of the prisoners; and that the Marshal shall remove from his place every such officer or person aforesaid who shall be guilty of violating this Rule, pursuant to the Rule of this Court of Michaelmas Term, in the 58th year of his late Majesty (Geo. 3).

* By 5 Vict. c. 22, the whole regulation of the prison is varied and altered; and the liberty of the rules abolished. An analysis of the statute will be given under tit. *Prisons*, post. Before 5 Vict. c. 22, it was ordered that not more than five prisoners should be in one room until the number should exceed 900. (Reg. Gen., 9 D. & R. 180). Where a party, whilst under an attachment in custody of the sheriff, was brought up in K. B. by habeas corpus cum causâ, and transferred to the Marshal from whom he escaped:—Held, that that being but a substitution of one ministerial officer for another, the Court had power to order the Marshal to pay the money for which the attachment had issued. (*Dewes* v. *Beresford*, Chancery, 5 Sim. 531).

JONES, *In re*, M. T. 1832. K. B. 4 *B. & Ad.* 365; S. C. 1 *N. & M.* 128.

ON a rule to shew cause why an attorney should not at all times go into the interior of the prison for the purpose of visiting his clients there. The Rule of Trinity Term (21 Geo. 3) gives a discretion to the Marshal to admit or refuse to admit whomsoever he shall think proper.

Per Cur.—That rule seems rather to apply to regulations respecting wives and families, and the introduction of spirituous liquors. The visitors spoken of can hardly mean the attornies who go thither for the benefit of their clients; but even in such a case, we should certainly consider that the Marshal had power to exclude, upon good cause being shewn to the Court.

The Court will not make an order for the admission of a party in the prison, unless it be an attorney, necessary to the interest of his client.

Kingston-upon-Hull.

REX *v.* KINGSTON-UPON-HULL, H. T. 1831. K. B. 1 *Ad. & E.* 880.

UPON a question arising as to the construction of the 4 Geo. 4, c. 64—

The Court held the justices of the town and county of Kingston-upon-Hull to have power to make a rate upon the town and county, for the purchase of land and building a gaol and house of correction; and that, on a proceeding under the s. 50, a special notice of the sessions, at which a due contract was entered into, was unnecessary; aliter where the resolution is only to enlarge or re-build; and judgment affirmed in Exchequer Chamber.

Under 4 Geo. 4, c. 64, justices have power to make a rate upon the county for building prisons, &c.

Labourers, Statute of.

BRAMWELL *v.* PENNECK, M. T. 1827. K. B. 1 *M. & Ry.* 409; S. C. 7 *B. & C.* 536.

A PARTY, whose name was added to that of the officer to whom the warrant in a fi. fa. was directed, was employed by the attorney to watch the property taken.

The Court held him not to be a person falling within the description of the stat. 20 Geo. 2, c. 16, "labourers employed in any other manner," so as to give the justices jurisdiction as to the payment of his claim for compensation or fees; the labourer must be a person employed in some description of work, in which the justices may fix the rate; and it was immaterial whether the justices knew of the party being named in the warrant.

The term, "labourer," in the 20 Geo. 2, c. 16, means a person employed in some description of work in which the justices may fix the rate.

LANCASTER *v.* GREAVES, T. T. 1829. K. B. 9 *B. & C.* 628.

UPON a contract to make a road according to a written specification, at a certain price, the information not shewing the relation of master and servant, but of two contracting parties—

The 4 Geo. 4, c. 34, as to labourers, only

applies to cases of contracts to serve.

The Court held, that the justice (defendant) had no authority to convict under the 4 Geo. 4, c. 34, s. 3, which applies only to cases of contracts to serve.

Lading, Bill of. See tit. *Ship and Shipping.*

Lancaster, Common Pleas of.

See 7 & 8 Geo. 4, c. 71, ss. 7, 131; 1 Will. 4, c. 7, ss. 9, 149.

BYRNE *v.* FITZHUGH, M. T. 1834. Ex. 1 *C., M. & R.* 597; S. C. 3 *D. P. C.* 278; S. C. 5 *Tyrw.* 221.

An application to set aside a verdict at the Common Pleas at Lancaster may be made before either of the fifteen Judges, all being Judges of that Court.

BY 4 & 5 Will. 4, c. 62, s. 26, it is enacted, "That it shall be lawful to and for the King's most excellent Majesty, in right of his duchy and county palatine of Lancaster, from time to time to nominate and appoint all or any of the Judges of the superior courts at Westminster to be Judges of the Court of Common Pleas for the county palatine of Lancaster: provided, nevertheless, that the Judges before whom the assizes for the said county palatine of Lancaster shall from time to time be held, and their respective officers, shall alone be entitled to the fees and emoluments heretofore received by the Judges of the said county palatine, and their officers." The trial had taken place in the Common Pleas at Lancaster. On motion to set the verdict aside—

Per Alderson, B.—All the Judges are now Judges of the Court of Common Pleas at Lancaster. Under the 24th clause, a commission issued for the purpose.

LORD *v.* CROSS, M. T. 1834. K. B. 4 *N. & M.* 30; S. C. 2 *Ad. & E.* 81; S. C. 3 *D. P. C.* 4.

If the party against whom judgment is recovered in the C. P. at Lancaster removes out of the palatine, a ca. sa. may issue, under 4 & 5 Will. 4, c. 62,

BY the 4 & 5 Will. 4, c. 62, s. 31, it is enacted, "That it shall and may be lawful for any of the superior courts at Westminster, upon a certificate from the Prothonotary of the said Court of Common Pleas at Lancaster, or his deputy, of final judgment obtained in any such action, to issue a writ or writs of execution thereupon for the amount of such judgment, and the costs of such writ or writs and certificate, to the sheriff of any county, city, liberty, or place, against the person or persons or goods of the party or parties against whom such final judgment shall have obtained, in such manner as upon judgments obtained in any of the said courts at Westminster." An affidavit, shewing the person of the defendant, against whom judgment had been recovered in the Court of C. P. at Lancaster, had removed out of the palatine—

The Court held sufficient to warrant the issuing a ca. sa., under 4 & 5 Will. 4, c. 62, s. 31, although his goods remained there.

DUCKWORTH *v.* FOGG, M. T. 1835. Ex. 2 *C., M. & R.* 736; S. C. 4 *D. P. C.* 396; S. C. 1 *T. & G.* 172.

if there be an affidavit to that effect.

APPLICATION, on the 4 & 5 Will. 4, c. 62, s. 31, (the Lancaster Court of Common Pleas Act), for leave to issue a writ of execution on a judgment recovered in that court against a person who had

removed out of the jurisdiction, a certificate was produced from the Prothonotary of the Court of the signing of the final judgment; but—

Per Cur.—There must be an affidavit of the party having removed his person, or goods and chattels.—Rule refused.

Landlord and Tenant.

See tits. *Covenant—Distress—Double Rent and Double Value—Ejectment—Lease—Use and Occupation.*

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I. RELATIVE SITUATION OF, HOW CREATED.

Chapman *v.* Bluck, M. T. 1837. C. P. 4 *Bing. N. S.* 187.

A letter by a lessor accepting the lessee's terms creates a demise*.

After an offer to let, and proposal by letter of terms, and for a valuation and lease to be prepared, the landlord wrote in answer that he accepted the defendant as his tenant agreeably to the terms, stating the time from which the term was to commence—

The Court held, that the agreement amounted to a present demise.

Lord Bolton *v.* Tomlyn, M. T. 1836. K. B. 1 *N. & P.* 247.

So, assenting to a printed agreement and entering the premises, though not signed, is sufficient to create a tenancy.

The father of the deceased occupier being tenant of a farm of which the tenancy would expire at Lady-day, the attorney of the landlord, in December, proposed to let that and other farms according to the terms of a printed paper, then read, and which the deceased assented to, and agreed to succeed his father at Lady-day, but no writing was signed, and he entered and continued in possession until his death, after which his executors, the defendants, entered, and paid the rent.

The Court held, that such agreement, followed by entry and payment of rent, created a tenancy upon the terms of the printed paper, and which might be referred to by the attorney, to shew the terms of the demise.

* Where the defendant held premises under a lease from A., against whom a sequestration issued, and he afterwards signed an instrument in the nature of an attornment to the plaintiff, the sequestrator, "I hereby attorn and become tenant to &c., and to hold the same for such time and on such conditions as may be subsequently agreed upon:"—Held, that it was in fact an agreement to become tenant, and required a stamp. (*Cornish* v. *Searell*, T. T. 1828, K. B., 8 B. & C. 471; abr., post, tit. *Use and Occupation*).

DOE *d.* JACKSON *v.* WILKINSON, M. T. 1824. K. B. 3 *B. & C.* 413; S. C. 5 *D. & R.* 273.

IN ejectment, it appeared that the defendant had erected a cottage on the waste, and occupied it for thirty years, but the lessor of the plaintiff who had bought the adjoining lands of the original owner, had subsequently demanded and received 6*d.* rent of the defendant on three occasions.

The Court held, that the Judge rightly treated it as acknowledging a tenancy, and conclusive of the former occupation having been only a permissive occupation.

And a payment of rent of 6*d.* per annum on three occasions is sufficient to create a tenantry.

BEES *v.* WILLIAMS, M. T. 1835. Ex. 2 *C., M. & R.* 581; S. C. 1 *T. & G.* 23.

TWO parties, tenants of different premises respectively, verbally agreed to exchange holdings, and pay the respective rents, and each took possession of the other's land on the same day, and the transaction was communicated the day after to the common agent of both landlords, who expressed his concurrence.

The Court held this to be evidence for a jury of a new demise.

If two tenants exchange holdings, and the landlords concur, it amounts to a new demise.

HAMERTON *v.* STEAD, M. T. 1824. K. B. 3 *B. & C.* 478; S. C. 5 *D. & R.* 206.

THE plaintiff being tenant from year to year to defendant received notice to quit, and before expiration of the year, the defendant agreed to let the premises to plaintiff and another for seven years, &c., and that a lease should be drawn with usual covenants, under which the lessees took possession, but no lease was ever executed.

The Court held, that, although such agreement might not amount to a lease, yet that the entry and holding of the two parties under it created a new tenancy.

So, A., whose term was about to expire, together with B., agreed to take a lease of the premises, but no lease was executed:—Held to create a new tenancy.

SAUNDERS *v.* MUSGRAVE, E. T. 1827. K. B. 6 *B. & C.* 524.

THE tenant occupied premises under an agreement for a future purchase of the residue of a term, the occupier in the mean time, and until an assignment should be made, to pay at the rate of 100*l.* per annum from the time of taking possession of the said premises until the completion of the purchase (the landlord to make certain alterations in a given time)—

The Court held it an occupation sufficient to constitute the relation of landlord and tenant, and will justify a distress for rent in arrear by the defendant, under the stat. 8 Ann. c. 14, s. 1.

A contract to purchase may create a contract between landlord and tenant.

DOIDGE *v.* BOWERS, E. T. 1837. Ex. 2 *M. & W.* 365.

A., B., and C. (whilst unmarried) entered into a contract in December, 1834, for a term of seven years, at a rent payable quarterly, but the plaintiff not having executed it, it could not operate as a demise, but under which they entered; in the following September C. married with one of the defendants, and A. afterwards became bankrupt, and his assignees paid the quarter's rent at Michaelmas, 1835, but it did not appear by whom the previous rent was paid, although

But a mere payment of rent by assignees of a bankrupt,

admitted to have been paid; and there was no evidence of any payment having been made before C.'s marriage, or with her assent after.

The Court held, that there was not sufficient evidence to raise an implied new tenancy, so as to charge the defendants in an action for use and occupation on a joint demise.

BARRY *v.* GOODMAN, T. T. 1837. Ex. 2 *M. & W.* 768.

or a memorandum that a party holds at sufferance, and agrees to give immediate possession, does not create a tenancy.

AN instrument in these words: "I hereby certify, that I remain in the house No. 3, Swinton-street, belonging to W. G., upon sufferance only, and agree to give immediate possession to him at any time he may require." Upon the defendant offering this document in evidence, it was objected that it could not be read for want of a stamp, as it was an agreement for a tenancy, and not an attornment. The Judge admitted the evidence, and the defendant had a verdict.

The Court held, that the document did not amount to an agreement for a tenancy, nor require a stamp.

DOE *d.* ROGERS *v.* PULLEN, T. T. 1835. C. P. 2 *Bing. N. S.* 479.

So, where a contract for a lease is abandoned, payment of a quarter's rent,

THE defendant had been tenant to parties, who entered into an agreement for a lease with the plaintiff, and afterwards on the expectation that it would be carried into effect, the defendant paid to the plaintiff a quarter's rent—

The Court held, that the agreement having been put an end to, the defendant might, in an action for subsequent use and occupation, shew that the owners of the legal reversion were remitted to their original rights, and no tenancy created.

HUNT *v.* COLSON, M. T. 1833. C. P. 3 *M. & Scott*, 790.

or a deduction from wages by way of rent, does not constitute a tenancy;

IN an action of trespass, it appeared that the plaintiff, a gatekeeper, was put by the trustees into a cottage to collect the tolls, and 1*s.* per week deducted from his wages by way of rent.

The Court held, that being annexed to his service, it did not constitute a tenancy to enable him to maintain trespass against his employers for pulling down the cottage after his being dismissed from the service.

STRACHAN *v.* SMITH, H. T. 1827. C. P. 4 *Bing.* 91.

nor is the relation of landlord and tenant created by the mere payment of rent under an order of Court.

IN an action for use and occupation, it appeared that N. P. assigned certain pictures to P. T., as an indemnity against all losses which he might incur on account of W. P. P. T. hired rooms of the plaintiff, at a yearly rent, and deposited the pictures therein. N. P. having died, the defendants administered to his effects as creditors, and filed a bill in Chancery against P. T. for an account, and he being unable to substantiate any claim, the suit was dismissed: pending the suit the plaintiff's rent was paid yearly, on the petition of the defendants, out of funds paid into Court, in the course of the cause; and the defendants eventually recovered the pictures from the plaintiff, under an order of the Court, and then paid him rent to the day of the delivery.

The Court held, that the relation of landlord and tenant did not subsist between the plaintiff and defendants, and consequently that

the former was not entitled to a notice to quit, nor could he demand rent to the end of the current year in which the pictures had been delivered up by him to the defendants.

II. RELATIVE TO THE PARTICULAR KIND OF TENANCY.

(*a*) Yearly* or quarterly.

Chapman *v.* Towner, H. T. 1840. Ex. 6 *M. & W.* 100.

Under an agreement for a lease a party may become tenant from year to year,

An agreement for twenty-one years, notwithstanding the words of demise, of agreeing on the one part to let, and on the other to take, provided for a lease, with special covenants, for sooner determining the term, and an option of purchasing at a stated price, and for payment of the rent, "and all the other usual covenants in leases at B," there being no complete demise independently of the lease to be executed.

The Court held, that the contract amounted only to an agreement for a lease, and that the party became only tenant from year to year, and determinable only by the regular notice, or by surrender in writing.

Doe *d.* Westmoreland *v.* Smith, M. T. 1827. K. B. 1 *M. & Ry.* 137.

if he enters, and pays rent;

In ejectment it appeared that the defendant had entered upon the premises under an agreement for a lease, and that since his entry he had paid rent to the landlord, agreeably to the terms of the intended lease, it was contended that payment of rent was evidence of a tenancy from year to year; and—

The Court held a tenancy from year to year was created.

Wilkinson *v.* Hall, M. T. 1836. C. P. 4 *Scott*, 301; S. C. 3 *Bing. N. S.* 508.

or from quarter to quarter.

The defendants entered into an agreement "that they should become tenants of the premises at 37*5l.* a quarter, the tenancy to

* The plaintiff was in possession of land under a lease, granted to him by one W. B., who had previously mortgaged the premises, the transferees of the mortgage (being cognizant of the lease) gave the plaintiff notice of the mortgage, and required him to pay them all rent due, and to become due, in respect of the mortgaged premises:—Held, that this was evidence whence the jury might infer a contract of tenancy for a year, as between the mortgagees and the plaintiff; held also, that the omission of the Judge to leave it to the jury to say whether or not the plaintiff assented to this new contract of tenancy, the fact not being disputed at the trial, did not amount to a misdirection. (*Brown* v. *Storey*, M. T. 1840, C. P., 1 M. & G. 117; S. C. 1 Scott, N. S. 9). So, where the occupier, under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement. (*Mann* v. *Lovejoy*, H. T. 1826, N. P., 1 Ry. & M. 355). If a person has held under the terms of a lease, and holds over after the lease is at end, he is bound by the terms of it, although no new bargain to that effect is entered into between the parties; but if he comes in as an under-tenant, before any lease was granted to the person of whom he took the premises, and that person afterwards takes a lease, if there is no evidence, that he knew of the lease, it will be for the jury to say whether he is not an under-tenant, and not an assignee of the lease. (*Torriano* v. *Young*, T. T. 1833, N. P., 6 C. & P. 8). A tenancy from year to year is to be considered as re-commencing every year; and therefore an allegation, that a party held under a demise from year to year, commencing from 16th November, 1836, is supported by proof of a tenancy, commencing several years before, and still continuing at that time. (*Tomkins* v. *Lawrance*, 1839, N. P., 8 C. & P. 722).

commence on the 14th June, they paying a quarter's rent on that day, and that they should give security to pay one quarter's rent in advance as long as they should continue tenants."

The Court held, that under this agreement the defendants did not become tenants from year to year, but from quarter to quarter only, and therefore that proof of such an agreement did not support an allegation that the defendants held "as tenants for a term of years, from year to year, for so long," &c., or "for the residue of a certain tenancy for a term of years," &c.

DOE *d.* PRITCHARD *v.* DODD, M. T. 1833. K. B. 2 *N. & M.* 838; S. C. 5 *B. & Ad.* 689.

Primâ facie payment of rent is evidence of a yearly tenancy; still that presumption may be rebutted.

THE rent was precisely that reserved, and much less than the real present value, and there had been a distress in reference to such lease—

The Court, on consideration, held, although payment of rent is primâ facie evidence only of a yearly tenancy, it may be rebutted by shewing that it was under the reservation in a lease.

WILSON *v.* ABBOTT, T. T. 1824. K. B. 3 *B. & C.* 88; S. C. 4 *D. & R.* 693.

A longer tenancy than that for a year will not be inferred.

THE defendant occupied apartments of the plaintiff at the rent of 45*l.* per annum, and he paid the first half-year's rent and afterwards paid that for the current quarter following, during which he occupied, and subsequently consented to pay the rent to the end of the current year.

The Court held, that, in the absence of any express contract creating a tenancy for a longer period than a year, it could not be inferred from the facts proved, and a nonsuit right.

DOE *d.* ROGERS *v.* PULLEN, T. T. 1835. C. P. 2 *Bing. N. S.* 479; S. C. 3 *Scott*, 245.

But, a promise that a party, if he pays the mortgage money, shall have an underlease, does not make him a tenant from year to year.

AN original lease, under which the defendant was let into possession, became forfeited, and the lessor, the lessee, and a party to whom he had mortgaged the lease, agreed that the latter should have a new lease granted, and should make an underlease to the defendant, who was put into possession upon a promise, that upon payment of the original mortgage sum he should have an underlease.

The Court held, that he did not become tenant from year to year, nor entitled to six months' notice to quit.

DOE *d.* CHADBURN *v.* GREEN, H. T. 1839. Q. B. 1 *P. & D.* 454.

An agreement for "one year certain, and so from year to year," is a tenancy for two years.

A DEMISE for one year, and so on from year to year until the tenancy should be determined as after mentioned, with a provision that either party might determine the tenancy by giving a three months' notice in writing—

Per Cur.—We are of opinion, where a party is to hold for one year and so on from year to year, we must say, consistently with the doctrine laid down in *Birch* v. *Wright*, (1 Term Rep. 380), and *Dunn* v. *Cartwright*, (1 East, Rep. 29), that there is necessarily created a tenancy for two years certain, which is determinable at the end of the second or any other subsequent year.

(*b*) Weekly*.

(*c*) At will†.

Doe *d.* Bennett *v.* Turner, M. T. 1840. Ex. 7 *M. & W.* 226.

Whether a tenancy at will is created may be a question for the jury.

The lessor of plaintiff had let the defendant into possession in 1817, as tenant at will, and ten years afterwards entered on the land, and without the consent of the tenant dug and carried away stone; the defendant, however, continued in possession as before until 1839, when the plaintiff brought his ejectment, and the jury found that the defendant during the whole period was tenant at will—

The Court held, that, by the entry in 1827, the tenancy at will being determined and the defendant become merely tenant by sufferance, the jury ought to have found whether a new tenancy at will was then created, and a new trial granted.

Doe *v.* Chamberlaine, E. T. 1839. Ex. 5 *M. & W.* 14.—S. P. Ball *v.* Cullimore, E. T. 1835. Ex. 2 *C., M. & R.* 120.

A party who enters under a contract to purchase, but has no conveyance, is only a tenant at will.

Upon an agreement for the purchase of premises by defendant he was let into possession forthwith, paying interest till the purchase-money should be paid, and completion of the purchase: he afterwards built on the land; no conveyance was ever tendered, nor any steps taken by the plaintiff to enforce the performance, but on failure in payment of the interest the vendor brought ejectment.

The Court held it to amount only to a tenancy at will; determinable without any notice to quit.

Doe *d.* Price *v.* Price, M. T. 1832. C. P. 9 *Bing.* 356; S. C. 2 *M. & Scott,* 464.

A tenancy at will is ended by a notice, that unless certain terms be complied with measures will be taken for the recovery of the property.

The defendant was merely tenant at will to the plaintiff; a letter was written by the plaintiff's attorney to the defendant's attorney, stating, that unless certain terms were complied with the plaintiff would without delay take measures for the recovery of the property—

The Court held this a sufficient determination of the tenancy.

Doe *d.* Jones *v.* Jones, E. T. 1830. K. B. 10 *B. & C.* 718.

A tenant at will has no right to

In ejectment—The Court held, 1st, that where the interest of a mere tenant at will is determined by demand of possession, he

* In the absence of any evidence of usage, it is not an implied term in a contract for a weekly tenancy that a week's notice is to be given; but, where a new week is entered upon, the tenant is bound to continue until the expiration of that week or to pay the week's rent. (*Huffell* v. *Armistead,* T. T. 1835, N. P., 7 C. & P. 56).

† Quære, whether the bare entry on the premises of a tenant at will during his absence and without his leave by the lessor, is sufficient to determine the will? (*Laprema* v. *M'Intosh,* 1 P. & D. 629).

remain in possession after a demand, and if he does he may be a trespasser.

has no legal right to continue for a reasonable time for the purpose of removing his goods; and 2ndly, the minister of a dissenting chapel has not in that character any legal estate in the buildings, and he is removable from them at the instance of the trustees, in whom the legal estate is vested; after a demand of possession by them, and a refusal to deliver up, he becomes a trespasser.

III. RELATIVE TO THE CONSTRUCTION OF CONTRACTS*.

COE *v.* CLAY, E. T. 1829. C. P. 5 *Bing.* 429; S. C. 3 *M. & P.* 57.

An agreement to let means a right to possession.

THE declaration stated, that the defendant on &c., at &c., agreed to let certain lands and premises to the plaintiffs for the term of seven years from the date of the agreement, at the yearly rent of 80*l.*, payable half-yearly; that it was further agreed that the plaintiff should pay all taxes, &c.; and that, if either of the parties should refuse to complete the agreement, he should forfeit 10*l.* Breach, that the defendant did not let the plaintiff into possession of the premises.

Per Cur.—This instrument has been truly called a lease. Now, what does a man who lets premises agree to do? To give possession undoubtedly; not the mere right to *sue* for the possession.

WHITTAKER *v.* BAKER, M. T. 1832. Ex. 1 *C. & M.* 113; S. C. 3 *Tyrw.* 135.

Where a tenant is to have the value of tillages upon "quitting," it means a quitting under the terms of the tenancy.

UPON a taking of a farm under a written agreement for a term, the tenant to receive the value of tillages quitting; the tenant at the end of the first year, upon some dispute, said he would quit, to which the landlord said he might.

The Court held, that he could not claim for the tillages, it not being a quitting under the terms of the tenancy, nor anything amounting to a determination of it, or surrender by operation of law.

SIMKIN *v.* ASHURST, T. T. 1834. Ex. 1 *C., M. & R.* 261; S. C. 4 *Tyrw.* 780.

Upon an underdemise the defendant agreed to pay a further sum if the superior landlord

THE plaintiff being possessed of a term of years, of which two years remained unexpired, demised to the defendant for the remainder of his term *minus* three days. By the agreement of demise, the defendant was to pay 100 guineas for the fixtures, and a further sum if he agreed with the superior landlord for a longer term. The

* An instrument will operate as a lease, or an agreement for a lease, according to the intention to be collected from the whole instrument. (*Perring* v. *Brook*, M. T. 1835, N. P., 1 M. & Rob. 510).

A., being in possession under a lease for years, underlet the premises from year to year to the defendants, who knew the extent of A.'s interest. The plaintiff afterwards took a lease of the same premises, expectant on the determination of A.'s term; and the defendants, after the determination of A.'s term, continued in possession for a quarter of a year, when they paid the rent for that period and claimed to give up the premises:—Held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year. (*Freeman* v. *Jury*, M. T. 1826, N. P., 1 M. & M. 19).

defendant remained in possession for about three quarters of a year after the expiration of the original term, and paid the superior landlord for so doing at a higher rate than the rent under the lease. There was an interview between the defendant and the original landlord, at which the subject of a renewal was discussed; but the landlord proved that they came to an agreement personally, and that he referred the defendant to his solicitor.

agreed for a longer term:—Held, that the tenant remaining at sufferance beyond the term did not entitle his lessor to the further sum.

The Court held, that the defendant appeared to have remained in possession only as tenant by sufferance, and that the plaintiff was not entitled to the further sum.

IV. RELATIVE TO TAKING POSSESSION.

Edman *v.* Allen, M. T. 1839. C. P. 6 *Bing. N. S.* 19.

In an action against the defendant for the breach of an agreement, by which he was to let to the plaintiff a messuage for a year, from the 25th of March, the plaintiff to take the fixtures at a valuation in the usual way, and to pay for the same on entry; and a plea alleging the custom of the country for the in-coming tenant and the landlord each to appoint an appraiser to value the fixtures, and for the valuation to be completed before the time when, by the terms of the demise, the tenant was to have possession; and that the defendant gave notice that his valuer would attend on the 19th of March, but that the plaintiff did not on that day, or before the 25th, cause any valuer to attend on his behalf, or any valuation to be made by reason whereof the defendant refused to allow him to take possession.

Unless a tenant be bound to take possession on the day of the demise, he may shew he was ready to enter afterwards.

The Court held (dissentiente *Coltman*, J.), that it was competent to the plaintiff to give evidence of a demand of possession, and of a tender of the value of the fixtures, and of a refusal by the defendant after the 25th of March, viz. on the 6th of April, inasmuch as, though the plaintiff agreed to take the premises from the 25th of March, he was not bound to enter upon that day.

V. RELATIVE TO THE LANDLORD'S TITLE.

Doe *d.* Wheble *v.* Fuller, H. T. 1836. Ex. 1 *T. & G.* 19.

A party built on the wastes, and before he had acquired a title, gave up the possession of it to the owner of the adjoining land, which he held on lease, granted in 1812, and who let the building to the defendant. In ejectment—

The lessee is estopped from denying his lessor's title*,

The Court held, that he was estopped from denying the title of his lessor, who was also estopped from denying that of the landlord.

* The defendant in March, 1832, took certain premises from F. and B., "agents for the trustees of the joint estates of T. and S. B." Upon the trial of an action for use and occupation, brought by the plaintiffs, "as trustees of the joint estate of T. and S. B." against the defendant, it appeared by the plaintiffs' own evidence that, in 1831, they were trustees for the estate of S. B. only:—Held, that the defendant was estopped from taking advantage of this discrepancy, having in 1832 taken the premises of plaintiffs as trustees of the joint estate. (*Fleming* v. *Gooding*, 4 M. & Scott, 455; 10 Bing. 549). If one party takes an interest in land under another, although that interest be wrongly acquired, he cannot afterwards dispute the title of the person under whom he took that interest. (*Doe* d. *Johnson* v. *Baytrup*, E. T. 1835, K. B., 4 Nev. & M. 837; 3 Ad. & E. 188.)

HALL *v.* BUTLER. T. T. 1839. Q. B. 2 *P. & D.* 374.

after payment of rent;

H. HAD been let into occupation of premises by W.; after he had remained a year in possession, B. represented himself as landlord of the premises, and N. confirmed his representation. B. permitted N. to take a quarter's rent then due; but H. afterwards paid B. a sum on account of rent, which subsequently became due, B. having distrained for rent which afterwards accrued. H. brought replevin, and B. avowed as landlord.

The Court held, that H. could not dispute the title of B. to the premises on a plea of non tenuit, he having paid rent to B.

DOE *d.* BULLEN *v.* MILLS, M. T. 1834. K. B. 4 *N. & M.* 25; S. C. 2 *M. & Rob.* 385; S. C. 2 *Ad. & E.* 17.

and an assignee is in the same situation as his lessor.

A PARTY who originally got possession of land, either as a trespasser or by the permission of a stranger, afterwards took a lease of the same land of the lessor of the plaintiff, and the defendant gave him 20*l.* in consideration that he gave up the possession to him.

The Court held, that the defendant must be considered as assignee of the lease, and that he could not dispute the title of the lessor of the plaintiff.

DOE *v.* BROWN, T. T. 1837. K. B. 7 *Ad. & E.* 447; S. C. 2 *N. & P.* 592.

But the rule as to disputing a lessor's title does not apply to a case of misrepresentation.

THE lessor, after having committed an act of bankruptcy, assigned premises demised, and informed the tenant that he had so done, and requested him to give 1*s.* as an acknowledgment to the assignees, which the tenant did, but he was not informed of the circumstances which rendered the assignment invalid; in ejectment by the assignees—

The Court held, that the tenant was not estopped nor the assignees under the commission, defending as landlords, from shewing that the lessor of plaintiff was not his landlord, it being open to a party, not guilty of laches, to explain and render inconclusive acts done under mistake or through misrepresentation.

VI. RELATIVE TO THE ALTERATION OF CONTRACTS CONNECTED WITH*.

DOE *d.* WATERS *v.* HOUGHTON, M. T. 1827. K. B. 1 *M. & Ry.* 208.

An alteration in an agree-

UNDER an agreement for holding lands until Michaelmas, and no longer, with liberty to hold certain parts until Lady-day. It ap-

P., N., and the plaintiff occupied successively premises, under a lease that had been granted, in 1809, by parties having no right to make a lease. The defendant in 1827 became possessed of the fee. In the years 1829 and 1831 respectively, the defendant distrained on P. and on N. for arrears of rent, which they paid:—Held, that these payments amounted to such an acquiescence by P. and N. in the title of the defendant, that they, and those deriving possession from or under them, were estopped from disputing it; and this, although the defendant himself produced in evidence the lease of 1809, and failed to shew that it had been assigned to him. (*Cooper* v. *Blandy*, 4 M. & Scott, 562).

* Where the original agreement was for a yearly tenancy, held not altered by the tenant agreeing to pay quarterly, and doing so; and that a distress for a quarter's rent was illegal. (*Turner* v. *Allday*, 1 T. & G. 819).

peared, that the agreement after it had been signed was altered in that part relating to the giving up the farm at Lady-day, by adding, after the word "farm," the words "house and premises," which was assented to by the defendant.

ment as to the description of the premises does not require a new stamp.

The Court held, that, as well on the ground of such assent, as also that the words added were implied in the word *farm*, the alteration *did* not vitiate nor render a new stamp necessary. Where an instrument is altered after execution, it binds in its altered shape parties assenting to the alteration, and those not assenting, in the shape in which it originally stood.

VII. RELATIVE TO THE RIGHTS OF THE LANDLORD.

(*a*) To re-enter.

1. *By Legal Proceedings**.

Doe *d.* Darlington *v.* Bond, T. T. 1825. K. B. 5 *B. & C.* 855.

In an action of ejectment, it appeared that the lease contained a proviso for re-entry if the lessee committed waste to the value of 10*s.*, and the tenant pulled down some old buildings of more than 10*s.* value, and substituted others of a different description.

There can be no re-entry, on the ground of waste, if the substitution be an improvement to the reversion.

The Court held, that the meaning of the proviso was, if waste were done, producing an injury of that extent to the reversion; and,

* By 1 & 2 Vict. c. 74, sect. 1, when tenant or occupier of premises where there is no rent, or where the rent does not exceed 20*l.* a year, refuses to give possession, the landlord may give him notice of his intention to proceed to recover possession under the authority of this act. If tenant does not appear or fails to shew cause why he does not give possession, the justices may issue their warrant, directing the constables to give the landlord possession.

Sect. 2. The manner in which such summonses shall be served.

Sect. 3. How execution of warrants of possession may be stayed.

Sect. 4. Proceedings on the bond in actions of trespass.

Sect. 5. Protection of justices, constables, &c.

Sect. 6. Where landlord has a lawful title he shall not be deemed a trespasser by reason of irregularity, but be liable in an action on the case for special damage proceeding from irregularity.

Sect. 7. Interpretation clause.

Sect. 8. Not to extend to Scotland or Ireland.

Sect. 9. Act may be repealed or altered.

A proviso in an agreement of demise, that the tenant should within a certain time erect a shop-front, &c., and that, if he did not do so, it should be lawful for the landlord or his agents to retake possession of the premises, and the agreement should be null and void, was held to make it a lease voidable only at the election of the lessor. (*Doe* d. *Nash* v. *Birch*, 1 M. & W. 402). In ejectment to recover demised premises for non-payment of rent, under the usual proviso for re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the 21st day, at one o'clock:—Held, that only one quarter's rent should have been demanded, and that at sunset. (*Doe* d. *Wheeldon* v. *Paul*, E. T. 1829, N. P., 3 C. & P. 613). Provisoes for re-entry in a lease are to be construed like other contracts, not with the strictness of conditions at common law. (*Doe* d. *Davis* v. *Elsam*, 1 M. & M. 189). Hence, a proviso in a lease, that if rent should be in arrear and no sufficient distress, or the lessee become insolvent or fail to perform the covenants, the lease should cease and be void, and the lessor might re-enter:—Held, to make the lease voidable only, and not absolutely void. (*Dakin* v. *Cope*, 2 Russ. 174; questioning *Doe* v. *Banckes*, 4 B. & A. 401).

as it was possible that the value of the reversion might be increased by the alteration, and that point had not been submitted to the consideration of the jury, a new trial was granted.

DOE *d.* LAWRENCE *v.* SHAWCROSS, H. T. 1825. K. B. 3 *B. & C.* 752; S. C. 5 *D. & R.* 711.

A service of a declaration in ejectment is the same as a demand of rent, with a view to re-entry.

IN ejectment, upon the right to re-enter—

The Court held, that by 4 Geo. 2, c. 28, s. 2, the service of declaration of ejectment is substituted for the demand of rent, which, at common law, must have been upon the day when the forfeiture was to accrue in case of its not being paid; and when served, the parties are in the same situation as if such a demand had been made, therefore, that it was no objection to the plaintiff's recovering, although the day of the demise was prior to the day when the declaration was served, and that the plaintiff was entitled to recover upon proof that half a year's rent was due before the service, and no sufficient distress, and that he had a power to re-enter.

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2. *Without Legal Interference.*

HEY *v.* MOORHOUSE, M. T. 1839. C. P. 6 *Bing. N. S.* 52; S. C. 8 *Scott*, 156.

A demand of possession by an agent is sufficient to revest the landlord*.

IN trespass, it appeared that it was agreed between the landlord and tenant that the latter should hold lands according to certain written rules, but the term agreed on was by parol:—Held, that on the expiration of the term, the entry of the landlord's agent to demand possession was sufficient to revest the possession, and render a party claiming under the tenant a trespasser; and it was not necessary in an action against the latter to produce in evidence the written rules.

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3. *Effect of.*

ARNSBY *v.* WOODWARD, T. T. 1827. K. B. 6 *B. & C.* 519.—S. P. HARTSHORNE *v.* WATSON, H. T. 1838. C. P. 6 *D. P. C.* 404; S. C. 4 *Bing. N. S.* 178; S. C. 5 *Scott*, 506.

The right to re-enter makes the lease void-

A LEASE contained a clause, that, on the breach of certain covenants the term should cease, determine, and be utterly void, and that it should be lawful to re-enter, &c.

* Where a tenant remains in apartments after the expiration of his term, the landlord is not justified in forcibly asserting his right to the possession by expelling him. (*Newton* v. *Harland*, M. T. 1840, C. P., 1 Scott, N. S. 473). If the landlord of lodgings enter into or use the lodgings while his tenant is in possession of them, it deprives the landlord of his right to rent; but if the tenant has, during the tenancy, abandoned the possession, and the landlord lights fires in the rooms, and even makes some use of such fires, he will not by this lose his right to rent. (*Griffith* v. *Hodges*, M. T. 1824, N. P., 1 C. & P. 419). If a tenancy of a house be determined, and the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street; but, if the tenancy be determined, and the tenant and his family be gone away and the house locked up, no one being in possession, the landlord would be justified in breaking into the house and of obtaining possession. (*Hillary* v. *Gay*, M. T. 1833, N. P., 6 C. & P. 284).

The Court held, that in such case the lease was not void but only voidable; and that a receipt of rent was such an acknowledgment by the landlord that the lease was subsisting at the time when such rent became due, that he could not afterwards insist upon a forfeiture previously committed.

able and not void.

(*b*) As to fixtures. See also, ante, tit. *Fixtures.*

MINSHALL *v.* LLOYD, E.T. 1837. Ex. 2 *M. & W.* 450; *questioning* TRAPPES *v.* HARTER, M. T. 1833. Ex. 2 *C. & M.* 153.

A. having a demise of a colliery for twenty-one years, with the right of erecting engines &c., and having erected steam-engines and other implements thereon, afterwards assigned them to trustees to permit B. to enjoy the same until default made in payment of an annuity to A., and the latter afterwards recovered the premises in ejectment in pursuance of the proviso for re-entry.

Where premises are assigned to trustees they have no greater right than the tenant.

The Court held, that, upon an execution issued by a creditor of B., under which the engines and other articles in the colliery were seized by the sheriff, the trustees could not maintain trover for the engines found to be affixed substantially to the freehold, they having only the same right of removal as the tenant, and that to be exercised during the tenancy.

WANSBROUGH *v.* MATON, E. T. 1836. K. B. 6 *N. & M.* 367; S. C. 4 *Ad. & E.* 884.

The tenant erected staddles with stone caps, and placed thereon a wooden and thatched building, connected in no other way than by resting the beams on the staddles, and might be taken to pieces and removed without injury to the soil.

A wooden building, resting on staddles, may be removed by the tenant.

The Court held, that the tenant was entitled to remove them, and might maintain trover for the materials.

BERRIMAN *v.* PEACOCK, M. T. 1832. C. P. 9 *Bing.* 384; S. C. 2 *M. & Scott,* 524.

In trespass, it appeared that the defendant being in the occupation of land adjoining a field let by the plaintiff to one Peter Wardell for a term of years, requested the latter to lower a fence between the two properties. Some delay occurring, the defendant lopped the fence himself, but carried the cuttings to Wardell, believing that, according to the custom of the country, he was entitled to them. The hedge was not cut in a skilful manner, but the tenant said he thought it a good job, and that the fence was the better for it.

The cuttings of bushes, though improperly done, belong to the tenant not the landlord*.

Per Cur.—It was laid down in *Douglas* v. *Kindal,* (Cro. Jac. 256), that the lord may not cut down any thorns, nor license any other to cut them down, for the defendant prescribeth to have all the thorns growing upon the place, and that prescription excluded the lord from taking any thorns there; but, if he had claimed common

* Box planted as a border in a garden cannot be removed by the tenant. (*Empson* v. *Soden,* E. T. 1832, K. B., 1 N. & M. 720; S. C. 4 B. & Ad. 655; abridged, ante, tit. *Fixtures*).

of estovers only, then, if the lord had first cut down the thorns, the commoner might not take them; and, if he had cut down all the thorns, the commoner might have had an assize. The general property in the cuttings of a hedge is in the tenant, and if by his permission a stranger cuts improperly, so as to damage the fence, that may give the landlord a ground of action on the case, but still the property in the cuttings is in the tenant.

(*c*) To detain tenant's goods, &c.*

SYMONS *v.* HEARSON, T. T. 1823. Ex. 12 *Price*, 369.

A tenant took apartments and furnished them, and then went away:—Held, that a party under a bill of sale had no right forcibly to enter to take possession.

THE plaintiff had let apartments to a person who, after having furnished and occupied them for a considerable time, had gone away, and the plaintiff had locked up the rooms, when the defendant, after demanding possession of the goods under a bill of sale to one V., and who had offered to pay a part of the rent demanded, had proceeded to remove them by force, and to the action for trespass and breaking the house, and injuring &c., and also for an assault, had pleaded amongst other things leave and license, and also that he entered by the command of V., the person entitled to the goods, to which the replication, de injuriâ, was pleaded; the jury gave damages, which upon inquiry they said was partly for the rent due and partly for the assault:—Held, that upon such replication to a license as large as the declaration, its effect was to put in issue whether the defendant had a license to cover all the trespasses complained of; and if the license proved did not cover all the trespasses alleged and proved, the plea failed:—Held also, that the jury having had the whole of the facts submitted to them, and been rightly directed by the Judge, it was no ground for impeaching the verdict, that they had given a bad reason for the damages they had assessed.

VIII. RELATIVE TO THE RIGHTS OF THE TENANT.

(*a*) As to quiet enjoyment†.

GRANGER *v.* COLLINS, E. T. 1840. Ex. 6 *M. & W.* 458.

On the mere relation of lessor and lessee, there is no

THE declaration in assumpsit stated that the defendant held a house and premises for the residue of a term, and that the defendant agreed to let, and the plaintiff to take them, at a certain rent; and,

* A receipt of rent by the lessor does not raise an implied promise on the part of the lessor not to interfere with the tenant's removal of his property. (*Bushby* v. *Fisher*, E. T. 1834, K. B., 3 N. & M. 381).

† A covenant by lessor, that lessee, paying the rent and performing the covenants, shall quietly enjoy, is not a conditional covenant; and a plea stating the non-payment of the rent or the non-performance of a covenant by the lessee (to insure) is no bar to an action by the lessee on the covenant for quiet enjoyment. (*Dawson* v. *Dyer*, 2 Nev. & M. 559; 5 B. & Ad. 584). Defendant, a lessee, covenanted that plaintiff, paying rent &c., should have quiet enjoyment of a term, upon an underlease to commence in 1836. Defendant having afterwards forfeited his own term, by non-payment of rent to the superior landlord, plaintiff could not come into possession of the term to commence in 1836:—Held, that plaintiff could not sue on the covenant for quiet enjoyment; at all events, not before 1836. (*Ireland* v. *Bircham*, 2 Bing. N. S. 99; 2 Scott, 207).

in consideration of the premises, the defendant undertook for quiet enjoyment.

such duty as quiet enjoyment;

The Court held the declaration bad, as, being founded on the simple relation of landlord and tenant, no such duty as that laid in the declaration arose on that relation.

BRASHIER *v.* JACKSON, T. T. 1840. Ex. 6 *M. & W.* 549.

even under an agreement for a lease;

THE declaration stated that the plaintiff became tenant to the defendant of a messuage, &c., upon certain terms, contained in certain articles of agreement in writing, whereby it was agreed that the defendant should make a good and sufficient lease, by indenture, of the said premises to the plaintiff, for twenty-one years to commence from Midsummer the next ensuing, at the yearly rent of 45*l.*, payable quarterly, on the four most usual days of payment during the said term, the first payment thereof to commence on the 29th of September then next, to be entered upon immediately by the plaintiff, he paying, upon the day of the date of the agreement, 25*l.* to the defendant; that the lease should contain a covenant to pay rent, repair, and all other usual and reasonable covenants, together with a covenant for quiet enjoyment, with power to either party to determine the lease at the end of seven or fourteen years; that the defendant, in consideration of the premises, agreed that the plaintiff should hold and enjoy the premises for the term of twenty-one years. The declaration then averred that the plaintiff paid the defendant 25*l.*, and that he continued such tenant as aforesaid from the 24th of June to the 24th of December, and then stated an eviction of the plaintiff by one T. B., the assignee of an insolvent debtor. The defendant pleaded, 1st, non assumpsit; 2ndly, non tenuit modo et formâ.

The Court held it to amount to an agreement for a lease only, and that the lessee was not entitled to recover as for the breach of an implied covenant for quiet enjoyment.

NEWSOME *v.* GRAHAM, M. T. 1829. K. B. 10 *B. & C.* 234.

but a tenant who is evicted by ejectment, may maintain money had and received against his landlord.

A TENANT, who paid rent to certain persons as trustees, claiming the legal title, was afterwards evicted by ejectment, and forced to pay again to persons who had a title paramount to the trustees, and it turned out that they had no title.

The Court held, that the tenant might recover back from the trustees, in an action for money had and received, the rent he had so paid them, notwithstanding the general rule, that title cannot be tried in that form of action.

(*b*) TO AN EASEMENT, AND USE OF BELLS, &c.*

HIBBERT *v.* THOMAS, H. T. 1835. Ex. 1 *C., M. & R.* 861; S. C. 5 *Tyrw.* 503.

On the question, whether

A., THE owner of certain freehold houses and land, with a yard adjoining thereto, demised, by parol, several of the houses. The

* If a person take lodgings on the first and second floors of a house, he has a right to the use of the door-bell, the knocker, the skylight of the staircase, and

the tenant is entitled to the use of a yard, the jury must say whether it had been demised.

tenants were in the habit of passing over the yard, and using a common pump and privy there. There was no evidence whether the yard formed part of the demise or not. In trespass, by one of the tenants against the landlord, for excluding him from the yard, the Judge left it to the jury to say whether the landlord, at the time of the demise, had reserved the yard.

The Court held, that this was a misdirection, the question being whether he had demised it, and not whether he had reserved it.

(*c*) To quit, in consequence of lessor's conduct*.

(*d*) As to crops, manure, &c.†.

Doe *d.* Upton *v.* Witherwick, E. T. 1825. C. P. 3 *Bing.* 11.

A tenant was turned out of possession by hab. fac. poss. whilst crops were on the ground. The Court refused to refer it to the Master to ascertain the value, so as to be deducted from the rent;

In ejectment, on a rule calling on the lessor of the plaintiffs to shew cause why it should not be referred to the Prothonotary to ascertain the value of the crops so seized under the writ of possession, executed in this cause, and why he should not pay over to the defendant such sum as the Prothonotary might find to be the amount of such valuation, and after deducting the amount of the rent due to the lessors of the plaintiff, it appeared that the defendant, the tenant, having held over after the expiration of his term, his landlord, together with other things, took possession of crops severed from the land, under a writ of habere facias possessionem, executed six months after the expiration of the tenancy.

The Court refused to exercise any summary jurisdiction, in referring it to the Prothonotary to ascertain the value of such crops, and require the landlord to pay over the amount to his tenant, after deducting the rent due from the latter to the former.

Hindle *v.* Pollitt, E. T. 1840. Ex. 6 *M. & W.* 529.

and a bond not to remove manure applies to cattle put on the land by others, who send food and remove the manure.

A tenant executed a bond to his landlord, conditioned that it should be void if he should not spread all the manure then collected on the midden-stead, or on any other part of the farm, on the land, and should not sell, cart, or convey away any manure from the farm. The tenant's stock upon the farm having been sold by auction, two of the cows, which were bought by one W., were permitted by the tenant to stay upon the premises for some weeks.

the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; therefore, if the landlord deprive the lodger of the use of either, an action lies. If the defendant in such a case merely pleads the general issue, he cannot shew that the water-closet was useless before he removed it; but, in mitigation of damages, he may go into evidence to shew that the plaintiff and his family were bad lodgers, and that he did the acts complained of to cause them to quit the house. (*Underwood* v. *Burrows*, H. T. 1835, N. P., 7 C. & P. 26).

* If a landlord of furnished lodgings, by his misconduct justifies a tenant in an abrupt departure during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation. (*Kirkman* v. *Jervis*, T. T. 1839, B. C., 7 D. P. C. 678).

† If a tenant of land during his tenancy remove a dung-heap, and, at the time of his so doing, digs into and removes virgin soil that is beneath it, the landlord

W. brought all their food daily from his own farm, and took away the manure made by them.

The Court held, that the condition of the bond was broken, as the manure so taken away was made on the land, and ought to have been spread upon the land.

(*e*) WHERE LESSOR CANNOT PERFORM HIS CONTRACT.

FORD *v.* TILEY, H. T. 1827. K. B. 6 *B. & C.* 325.

IN an action on breach of an agreement to grant a lease of premises to which the defendant would shortly be entitled, but the legal estate of which was then in trustees, first, to pay debts, then to pay an annuity, and subject thereto to the use of defendant, if he attained twenty-four; and he, after attaining that age, and pending the life of the annuitant, joined with the trustees in a lease to a third party for twenty-three years.

A landlord, who executes a lease which puts it out of his power to perform an agreement, is liable to an action.

The Court held, that having thereby put it out of his power to perform the agreement, if the annuitant should die before such lease expired, there was a breach, for which he was liable to an action.

IX. RELATIVE TO RATES AND TAXES. See also, post, tits. *Taxes—Poor-Rate.*

WALLER *v.* ANDREWS, M. T. 1837. Ex. 3 *M. & W.* 302.

ON an agreement of demise, the defendants were to pay all rates, &c., land-tax excepted—

An extraordinary sewers rate comes within "all rates" &c. except land-tax, to be paid by the tenant.

The Court held, that an extraordinary assessment by the commissioners of sewers, for works producing a permanent benefit to the lands, was within the agreement; but the rate being made in proportions upon the owners and occupiers, and the tenant having for four years paid both, and, in settling with the landlord's agent, who was ignorant of that agreement, deducted the former, and receipts were given for the balance:—Held, in an action on the agreement to recover the amount so deducted, as arrears of rent, that the facts supported a plea of payment.

X. RELATIVE TO REPAIRS*.

JOHNSON *v.* CHURCHWARDENS, &c., OF HEREFORD, H. T. 1836. K. B. 6 *N. & M.* 106.

IN assumpsit for non-repair, it appeared that the lessee had held over after the expiration of the lease. On the question to what repairs his liability extended—

Continuing to hold after the expiration

'may maintain either trespass de bonis asportatis, or trover for the removal of the virgin soil. (*Higgon* v. *Mortimer*, 1834, N. P., 6 C. & P. 616).

* A general covenant to repair is satisfied by the lessee keeping the premises in *substantial repair;* a literal performance of the covenant is not to be required;

of the lease renders it incumbent on the tenant to deliver the premises in the same state of repair as when the original lease expired.

The Court held the principle, that a tenant who holds over after the expiration of a lease holds subject to the terms and covenants contained in that lease, only extends to make a tenant liable, upon such implied undertaking, for any breach of those covenants which has accrued since the expiration of the lease, and not for a mere continuing breach of a covenant broken whilst the lease was running, and only on such covenants as may be consistent with the state in which the premises were at the time when the lease expired, and the supposed implied undertaking arose.

(*Harris* v. *Jones*, H. T. 1832, N. P., 1 M. & Rob. 173); and a tenant from year to year of a house is only bound to keep it wind and water tight. A tenant who covenants to repair is to sustain and uphold the premises, but that is not so with a tenant from year to year, (*Auworth* v. *Johnson*, E. T. 1832, N. P., 5 C. & P. 239), who is not bound to do substantial repairs. (*Leach* v. *Thomas*, 1835, N. P., 7 C. & P. 327). The term, "habitable repair," means a state of repair fit for the occupation of an inhabitant. Where a tenant takes premises which are out of repair, and agrees "to put the premises into habitable repair," this implies that he is to put them into a better state than that in which he found them; and, regard being had to the state of the premises at the time of the agreement, and of their situation, and to the class of persons likely to inhabit them, he is to put them into a condition fit for a tenant to inhabit; (*Belcher* v. *M'Intosh*, H. T. 1839, N. P., 8 C. & P. 720); but where a very old house is demised, with the usual covenants to repair, it is not meant that the house should be restored in an improved state, and that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care. (*Gutteridge* v. *Munyard*, H. T. 1836, C. P., 7 C. & P. 129; S. C. 1 M. & Rob. 334). A landlord has no right to enter in order to repair, without some stipulation to that effect; and the tenant may maintain trespass against him. (*Barker* v. *Barker*, M. T. 1828, N. P., 3 C. & P. 557). Where the landlord covenanted to re-build the demised premises, if they should be destroyed by fire, in the same state as they were in before the happening of such fire:—Held, that he was only bound to build such premises as he had demised, and not subsequent erections by the tenant. (*Loader* v. *Kemp*, T. T. 1826, N. P., 2 C. & P. 375). On a covenant to repair, the lessee is not liable for the expense of renewing works in an improved and more durable manner. (*Soward* v. *Leggatt*, M. T. 1836, N. P., 7 C. & P. 613).

The executors of a deceased incumbent are not bound to put the rectory-house and premises into a finished state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber, in the estimate of dilapidations due from them. (*Percival* v. *Cooke*, 1826, N. P., 2 C. & P. 460). A. makes an agreement with B. for the sale of premises, at the time in the possession of C., under an agreement for four years (three of which have expired), and undertakes to B. that he will do such repairs as are left undone by C., at the expiration of his (C.'s) tenancy. B. makes an agreement with C., in pursuance of which, C. quits before the end of the four years, leaving the premises out of repair; semble, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy, as created by the agreement between A. and C. (*Goodson* v. *Gouldsmith*, M. T. 1826, N. P., 2 C. & P., 555). A. agreed to take an assignment of a lease of a house, which was out of repair, from B.; and by the agreement it was stipulated that all outgoings should be paid by B. up to April 23rd; and by an assignment indorsed on the lease (executed by B., but not by A.), B. assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from the 22nd day of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and after the assignment the reversioner sued B., and recovered for dilapidations which occurred before April 22:—Held, that B. could not maintain an action on the case against A. for these dilapidations, even though it could be proved that A. gave a smaller price, because the premises were out of repair. (*Hawkins* v. *Sherman*, M. T. 1828, N. P., 3 C. & P. 459).

DONELLAN *v.* READ, H. T 1833. K. B. 3 *B. & Ad.* 899.

AFTER a lease granted for a term at a certain rent, it was agreed by a memorandum in writing, but not signed, that the plaintiff, the landlord, should lay out a sum in alterations, and the defendant pay an increased rent of 5*l.* during the remainder of the term, to commence at the quarter preceding the completion of the work.

An agreement by a lessor to do certain repairs in consideration of an increased rent is only collateral to the lease and binding.

The Court held, that, the work being to be done within the year, although the additional rent was to continue to the end of the lease, the case was not within the Statute of Frauds as a contract not to be performed within the year; nor was it a contract by which the landlord or tenant acquired any further interest in the land; notwithstanding the use of the word rent, it could not be considered strictly such, nor the agreement as amounting to a new demise, operating as a surrender of the lease, being merely collateral to it, and which it was never intended to affect.

DALLMAN *v.* KING, H. T. 1837. C. P. 4 *Bing. N. S.* 105; S. C. 3 *Scott*, 382.

THE lessee covenanted to expend £— in repairs, &c., to be inspected and approved of by the lessor; and by a clause afterwards it was declared that he should be allowed the sum of £— towards such repairs, and be at liberty to retain it out of the first year's rent.

And, where repairs are to be approved of and inspected by the lessor, it is not a condition precedent.

The Court held, that the approval of the lessor was not in nature of a condition precedent to the right to retain; and the jury having found the covenant to have been substantially complied with, held that the lessee was entitled to deduct it.

RICHARDSON *v.* GIFFORD, E. T. 1834. K. B. 3 *N. & M.* 325; S. C. 1 *Ad. & E.* 52.—S. P. BEAL *v.* SAUNDERS, M. T. 1836. C. P. 3 *Bing. N. S.* 850.

IN assumpsit, the declaration in one count stated, that, in consideration the defendant had become tenant, he undertook to keep the premises in tenantable repair, and an agreement of demise was produced for a term exceeding three years, stamped only as an agreement and not signed by both parties.

Although an agreement under the Statute of Frauds may be void, the lessee may be liable under the general count to repair.

The Court held, that although the agreement was void under the Statute of Frauds, yet the defendant was liable on the undertaking as stated in that count.

WOODS *v.* POPE, H. T. 1835. C. P. 1 *Bing. N. S.* 467; S. C. 1 *Scott*, 536; S. C. 6 *C. & P.* 782.

IN an action by landlord against tenant for non-repair, it was proved that the defendant was liable to repair the premises, and that he had left them out of repair; and it was not disputed that the sum paid into Court was the sum expended by the plaintiff in putting the premises in repair; but, it was contended, that, as the defendant did not keep the premises in repair during his tenancy as he ought to have done, and left them out of repair, the plaintiff was entitled to recover not only the actual expense of the repairs, but also a compensation for the loss of the use of the premises for a reasonable time during the time that the plaintiff had them under repair.

Where a tenant neglects to repair, it seems the lessor may not only recover the sum expended, but for the loss of the use of the premises whilst repairing.

Gaselee, J.—It is a new point. Verdict for the plaintiff, damages 13*l.* 15*s.*, being for the loss of the use of the premises while they were under repair.

On motion for a new trial the Court refused to interfere.

LOFTS *v.* HUDSON, T. T. 1828. K. B. 2 *M. & Ry.* 481.

A landlord cannot be rendered liable for repairs done to a tenant's premises by evidence of a mere negotiation for a compromise.

THE defendant was sued for work done on premises in the occupation of his tenant, and upon an interview between the plaintiff and his attorney, the defendant and his tenant, it was agreed that the tenant, out of the rent, should pay the debt, which he accordingly did, and that the defendant should pay two-thirds of the costs; this not being done, the plaintiff proceeded in the action; at the trial, he failed in proving the defendant's liability for the work, but relied on the arrangement so made as an admission of the debt.

Held, (per *Littledale* and *Holroyd*, JJ., diss. *Bayley*, J.), that, if even it were admissible in evidence as being upon a negotiation for a compromise, it did not shew an original right of action, although it might have been evidence to support a new ground of action on that agreement.

COURTENAY *v.* FISHER, M. T. 1826. C. P. 4 *Bing.* 3; S. C. 12 *Moore*, 39.

A tree had been selected by the bailiff for housebote; before it was felled the bailiff was dismissed:—Held, that the tenant was entitled to the tree.

IN an action for trespass for cutting down a tree, it appeared that, by a lease for lives, all trees were reserved to the landlord, except those which might be delivered by the steward or bailiff for housebote, and the bailiff marked a tree, and told the tenant that he might cut it down at any time; but it was not felled by the tenant until October, and after the bailiff had been discharged.

The Court held, that, there being no countermand of the license, the tenant was entitled to act on it, and that the delivery was sufficient.

JOHNSON *v.* ST. PETER HEREFORD, E. T. 1836. K. B. 4 *Ad. & E.* 520.

A purchaser cannot sue for non-repair before the purchase.

A. DEMISED to B. for a term of years two messuages; the lease contained a covenant by B. that he would during the term keep the premises in repair, and leave them, at the end of the term, in good repair, and in the same state as they were in at the beginning. At the end of the term the messuages were out of repair, and had been converted into a single house; B. held on without a fresh lease, and C. afterwards purchased the reversion of A., and B. continued to hold on under C.

The Court held, that B. was not liable in assumpsit on an implied contract to put the messuages in such repair, and in the same state as they were in at the commencement of the term; that, supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion.

XI. RELATIVE TO THE ASSIGNEES. See post, tit. *Lease*.

XII. RELATIVE TO CONTRACT TO INDEMNIFY.

UPTON *v.* FERGUSON, H. T. 1833. C. P. 3 *M. & Scott*, 88.

If a sub-lessee is aware that his lessor holds under a lease, and the superior landlord distrains, the law does not imply an indemnity.

BY the terms of an agreement for letting to the plaintiff, a sub-lessee, he was to keep the rents &c., after a certain day, paid up, and be allowed for them.

The Court held, that, having notice of the defendant holding under a lease, and taking subject to it, there was no implied indemnity on the part of the defendant, the superior landlord having distrained at the end of the first quarter, although the rent between the plaintiff and defendant was stipulated for as a yearly rent.

XIII. RELATIVE TO OUTGOING AND INCOMING TENANT.

HUTTON *v.* WARREN, E. T. 1836. Ex. 1 *M. & W.* 466.

A written demise does not control the custom*.

A CUSTOM that an allowance was to be made to the outgoing tenant for seeds and labour for the last year, and for the manure to be left, and paid for by the landlord, if he pleases.

The Court held, that the custom was not to be controlled by the terms of a written demise, the customary obligation not being inconsistent therewith, and where those terms shewed that the parties had no intention to exclude such obligation.

XIV. RELATIVE TO THE CONTINUATION OF THE TENANCY.

PEIRSE *v.* SHARR, T. T. 1828. K. B. 2 *M. & Ry.* 418.

In the absence of any new agreement, the tenancy continues on the same terms;

IN replevin, it appeared that the avowant, whilst holding for a term of years, underlet part to the plaintiff from year to year, and, upon the expiration of his own term, agreed with his landlord to hold on from month to month.

The Court held, that, in the absence of any new agreement between the plaintiff and the avowant, the former tenancy between them continued.

BROWN *v.* BURTINSHAW, M. T. 1826. K. B. 7 *D. & R.* 603.

but if a contract be silent

ON a contract by defendants to let certain parts of a factory, and to find power for turning certain machinery, at —— per year, to be

* When the tenancy of a farm expires, the tenant must give up the possession of the whole of it to the landlord, crops, and every thing else, unless there be a custom of the country for the tenant to hold over any part, or to take any of the crops; and the proof of the custom lies on the tenant. If the custom of the country be for an outgoing tenant, for what is called his odd mark, to crop one-third of the arable in wheat and to reap that wheat, after the tenancy has expired, and the tenant so crop more than the proper one-third, the landlord will be entitled to have all that which was last sown, and which is above one-third, unless it be shewn that the tenant has a lien upon it for the sowing and the seed; (*Caldecott* v. *Smythies*, 1837, N. P., 7 C. & P. 808); and a verbal permission by the landlord to sow beyond the one-third would be good as against him and his incoming tenant. (*Griffiths* v. *Tombs*, 1833, N. P., 7 C. & P. 810, n.).

as to the time of holding, a particular usage will be binding.

paid quarterly, and three months' notice from each party; and a notice was given in the middle of the year, but the only evidence of acquiescence in the notice by the plaintiff was by his consenting to give up the key, long after the expiration of the notice, but which consent he almost immediately recalled, and the defendant warned him that he would be liable for the rent.

The Court held, that an acquiescence, given so long after the notice had expired, was too late to have any operation; and that the contract being silent as to the term of holding, and there being a particular usage in such places as to determining such holdings, evidence of such usage was properly receivable.

XV. RELATIVE TO THE DISSOLUTION OF THE TENANCY*.

Christy *v.* Tancred, M. T. 1840. Ex. *7 M. & W.* 127.

The directors of a company, who take premises, continue liable notwithstanding they cease to be directors;

Upon a demise of premises to A., B., C., and D., the directors of a company, for a year ending at Midsummer, with proviso that, on a month's notice previous to that day, the lessor would grant a lease for seven, fourteen, or twenty-one years, B. having ceased to be a director in January, and C. in March, and an application in May, by the then directors, to renew the tenancy for another year, and in June a like application for one quarter of a year, but nothing done thereon, and on the following Michaelmas the premises were delivered up—

The Court held, that the original parties continued liable for the rent up to Michaelmas.

Wainwright *v.* Ramsden, M. T. 1839. Ex. *5 M. & W.* 603.

and a tenant who quits in consequence of a railway is still liable to his landlord;

The defendant occupied as yearly tenant, at a rent payable half-yearly, in April and October; and the premises being required by a railway company, who, under their act, were authorized to take the premises on giving six months' notice, which they gave, expiring on 28th July, and the defendant having quitted without requiring compensation—

The Court held, that he continued liable to his landlord for the remaining period up to October, as he might have refused to have quitted unless compensation was made for his interest in the premises.

Ball *v.* Cullimore, E. T. 1835. Ex. *2 C., M. & R.* 120.

but a tenancy at will is destroyed, if the lessor makes a feoffment of the land, with

In trespass, it appeared that the plaintiff claimed the close in question by virtue of a lease from one Richard Withers, the elder. He had been in possession of the land for many years, and in 1831 executed a feoffment, whereby he conveyed the same to the plaintiff in fee. Some time previously he had agreed verbally to sell the

* A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. (*Rickett* v. *Tullick*, E. T. 1833, N. P., 6 C. & P. 66; see *Mollett* v. *Brayne*, 2 Campb. 103).

same land to his son, Thomas Withers, who paid him a small sum of money in part of the purchase-money, and was put into possession of the land. After the feoffment had been executed, the attorney of the feoffor proceeded with the plaintiff to the land, to make livery of seisin. The defendant, Thomas Withers, was then on the ground, but went off without any knowledge of their purpose. After he was gone, livery of seisin was made to the plaintiff. The possession was, however, disputed by Thomas Withers, down to the commencement of the action. The jury found that Thomas Withers did not go off the ground for the purpose of giving up the possession.

livery of seisin*.

Per Cur.—Tenancies at will are the smallest interests in land which the law recognizes, and may be determined at any moment. No precise form is required for such determination; for though mere words of the lessor off the land will not do of themselves, yet a solemn act on the land will have that effect; if, then, he makes a feoffment and livery on the land, and takes possession, and delivers it to another, the tenancy is put an end to.

DOE *d.* THOMSON *v.* AMEY, T. T. 1840. Q. B. 4 *P. & D.* 177.

THE defendant entered upon a farm under an agreement for a lease, to contain covenants, inter alia, against growing successive crops, and for forfeiture and re-entry in case of breaches, but no lease was ever executed.

An agreement for specific covenants, though no lease is executed, is binding as to a forfeiture.

The Court held, that, upon breach of such covenant, although the tenancy was only from year to year, the tenant was bound by the agreement for such specific covenants, and a forfeiture incurred by breach of covenants.

XVI. RELATIVE TO THE REMEDIES CONNECTED WITH.

(*a*) ACTIONS BETWEEN†.

(*b*) DECLARATION.

HOLFORD *v.* DUNNETT, H. T. 1841. Ex. 7 *M. & W.* 348.

IN an action by landlord against tenant, the first count set out the written agreement containing the terms of holding, and alleged

If there be an express con-

* If A. let a part of a house to a firm consisting of himself and B., for the carrying on of the business of the firm, and the partnership of A. and B. be dissolved, A. may bring an ejectment against B., and recover possession of the part of the house thus let, without giving B. a notice to quit. (*Doe* d. *Colnaghi* v. *Bluck*, H. T. 1838, N. P., 8 C. & P. 464).

† The plaintiff repaired certain leasehold premises, held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease:—Held, that the defendant, upon refusal to assign, was liable on an implied assumpsit to pay the plaintiff for such repairs; (*Gray* v. *Hill*, T. T. 1826, N. P., 1 Ry. & M. 420); but if parties having a right to a garden have given another notice not to trespass there, and afterwards they give that person half a year's notice to quit "all gardens held of them," at a time later than all the alleged trespasses, they can bring no action for such trespasses, because they have since acknowledged the defendant as their tenant. (*Barton* v. *Cordy*, 1825, N. P., 1 C. & P. 664).

tract, the plaintiff cannot recover on an implied one*.

a particular breach in not repairing; other counts upon the implied contract for using the premises in an untenant-like manner, proceeded to set out various breaches—

The Court held, that, there being but one contract of demise, the plaintiff could not recover damages on the latter counts as an implied promise, unless he shewed a second contract, and applying to different premises.

ANGERSTEIN *v.* HANDSON, H. T. 1835. Ex. 1 *C., M. & R.* 789; S. C. 5 *Tyrw.* 383.

If the plaintiff, for a breach of good husbandry, merely sets out the custom, which the defendant denies, and the jury find that there is no such custom, the plaintiff is not entitled to recover†.

THE declaration in assumpsit for breach of good husbandry alleged the promise to be, to cultivate according to the course of good husbandry and the custom of the country where the lands were situate, and set out the custom alleging breaches; the plea traversed the custom, but did not deny the instances of alleged mismanagement; the jury negatived the custom as averred, but found that the defendant had not managed according to the course of good husbandry of the country.

The Court held, that the plaintiff was bound to prove the custom as laid, and that, having failed in so doing, the defendant was entitled to recover.

(*c*) PLEAS.

HARTLEY *v.* BURKITT, T. T. 1838. C. P. 6 *Scott*, 497; S. C. 4 *Bing. N. S.* 687.

A plea of no such custom, is good.

IN case against a tenant for carrying away hay off the farm, without bringing back manure, in an untenantable manner, and contrary to the custom of the country; plea, no such custom. On demurrer—

The Court held the plea to be sufficient.

HALIFAX *v.* CHAMBERS, E. T. 1839. Ex. 7 *D. P. C.* 342; S. C. 4 *M. & W.* 661.

Plea denying "that defendant was such tenant" only puts that fact in issue, and the lease need not be produced.

IN case for mismanaging a farm, and contrary to the custom of the country; plea, traversing that the defendant was such tenant to the plaintiff, modo et formâ—

The Court held, that upon this issue, which put only in issue a tenancy in fact, the plaintiff was not obliged to produce the lease to shew that the terms of it were consistent with the alleged obligation to cultivate according to the custom.

* If the declaration, in an action by B. against A., aver that C. did not leave the premises in good repair at the expiration of his tenancy, the agreement between A. and C. need not be produced to prove such averment. (*Goodson* v. *Gouldsmith*, M. T. 1826, N. P., 2 C. & P. 555). A declaration upon a covenant, whereby A. and B. jointly and severally covenanted to repair during the term, alleged as a breach that neither A. nor B., whilst the latter was unmarried, nor A., nor B., nor C. her husband, since the marriage of B. with C., did repair during the term, &c. A plea that A. and B. and C. did, during the term, repair, &c., is bad on special demurrer. (*Marshall* v. *Whiteside*, H. T. 1836, Ex., 4 D. P. C. 766).

† It seems a breach for not "managing a farm in a good, proper, and husband-like manner, according to custom, &c.," is bad on special demurrer. (*Earl of Falmouth* v. *Thomas*, M. T. 1832, Ex., 1 C. & M. 89; S. C. 3 Tyrw. 26).

GREGORY *v.* DOIDGE, E. T. 1826. C. P. 3 *Bing.* 474.

An acknowledgment of title, without knowing it was in dispute, is not binding, and the defendant may plead non tenuit.

THE tenant having occupied under the former owner, after his death, entered into an agreement with the brother of the plaintiff, alleged to be entitled, and paid 1*s.* as an acknowledgment of his title, being ignorant that it was in dispute.

The Court held, if a person continue in possession of premises which he originally occupied under A. B., and a stranger afterwards requires him to pay rent to him, if such payment be made through mistake or misrepresentation, the person so paying is not prevented, under a plea of non tenuit in replevin, from shewing that the party making the demand had no right to call on him for the rent.

SMITH *v.* KING, M. T. 1833. C. P. 2 *D. P. C.* 750; S. C. 3 *M. & Scott*, 790.

In an action for rent and dilapidations, the Court allowed the defendant to pay money into Court.

IN an action by landlord against tenant, for rent and dilapidations, the plaintiff particularly claimed a specific sum for dilapidations—

The Court held, that the defendant might pay that sum into Court, and the plaintiff proceed on that count at his peril.

(*d*) EVIDENCE.

WALLISS *v.* BROADBENT, M. T. 1836. K. B. 4 *Ad. & E.* 877.

Where a tenant agrees with the reversioner to hold on the same terms, the original lease must be produced*.

IN an action of assumpsit, the declaration alleged that the defendant held lands on lease, of which the plaintiff becoming entitled to the reversion, the defendant, in consideration of a reduction of the rent, entered into an agreement to hold of the plaintiff on the same terms in all other respects, and then alleged breaches—

The Court held, that the plaintiff not being able to produce the lease, could not rely upon implied terms of holding under the original lease without putting it in evidence, as it could not be considered as mere inducement.

DOE *d.* THOMPSON *v.* CLARK, M. T. 1828. K. B. 8 *B. & C.* 717.

It is for the jury to say whether the tenant occupies by adverse title or license.

THE party in possession of a cottage, built on the side of a road, above fifty years, upon possession being, within twenty years, demanded by B., the owner of the land adjoining on both sides of the road, had gone out, and on retaking possession, by leave of such owner, had been told that "if he let him in again, it would be during

* In an action for a breach of covenant to keep a house in repair, though the defendant may shew generally in what state the premises were at the commencement of the term, and whether they were new or old, it is not competent to him to shew it in matters of detail. (*Mantz* v. *Goring*, H. T. 1830, C. P., 4 Bing. N. S. 451). If there be a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170*l.* a year, and afterwards an arrangement is made by parol that 30*l.* a year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement, so as to reduce the rent payable under it, and therefore an allegation is correct which states it to be 170*l.* (*Hilton* v. *Goodhind*, H. T. 1827, N. P., 2 C. & P. 591). In an action for rent of land verbally let, on the same terms as the former tenant's lease, such lease must be produced, properly stamped. (*Turner* v. *Power*, M. T. 1827, N. P., 1 M. & M. 131).

his pleasure;" and he continued to occupy it without paying any rent for fifteen years.

The Court held, that it was a question for the jury to say whether he remained in the cottage by adverse title, or by permission of B.; and they having found that he occupied by permission, the Court refused to disturb the verdict found for the plaintiff.

TRAVIS *v.* COLLINS, T. T. 1832. Ex. 2 *C. & J.* 625; S. C. 2 *Tyrw.* 726.

If two agreements be executed, the assignee of the landlord cannot call upon the tenant to produce his part to be stamped.

THIS was an action by the purchaser of a mill on an agreement of the defendant (the tenant in possession at the time of the purchase) with Hatfield the vendor, to which the plaintiff was no party, to keep the same in tenantable repair. The plaintiff had filed a bill in Chancery against the defendant to enforce the rebuilding of the mill, which had been destroyed by fire, in his answer to which the defendant admitted the existence of the agreement, and a copy was set out. After a summons taken out before *Bolland*, B., on the 20th of January, and discharged, a rule was obtained to shew cause why the defendant should not produce the agreement at the Stamp-Office in order that a stamp might be affixed—

Per Cur.—If only one part of the agreement had originally existed, the Court, as a matter of course, would have ordered the party in whose possession it was to attend at the Stamp-Office for the purpose of having it stamped; and had it been found, that, for the purpose of evading the order of the Court, the instrument had been destroyed, the Court, under such circumstances, might have directed a copy to be stamped; but, whether that would have made the copy stamped admissible in evidence, would have been a matter of very great doubt. The rule, that a party who has an instrument in his possession shall be compelled to produce it for the purpose of stamping, does not apply if it appears that at the time the agreement was made there were two parts interchangeably executed.

DOE *d.* OLIVER *v.* POWELL, T. T. 1834. K. B. 3 *N. & M.* 616.

Where a company let premises by feoffment, and they afterwards passed into other hands by bankruptcy of the lessees:—Held, that evidence impeaching the company's title was admissible.

POPE enfeoffed the Tredegar Wharf Company with certain land. The company entered and pulled down fences and put up others, and made other alterations. In 1824, the company granted a building lease for seventy-eight years of part of the premises to the defendant Powell. In 1825, the company granted a building lease for seventy-five years of another portion of the same land to Williams, who afterwards assigned to the defendant Pyne. In 1833, the assignees of Pope conveyed to the lessor of the plaintiff by lease and release the whole of the land in dispute. The defendant proposed to shew, by a deed of 1808, that the legal estate was not in the company at the time of the feoffment in 1818. This evidence *Gurney*, B., rejected, on the ground that the defendants themselves came in under the company, and therefore could not say that the company had no title to convey.

Per Cur.—The lessor of the plaintiff derived under the Tredegar Wharf Company; that company had, by a feoffment made in 1818, conveyed to Pope, whose assignees (he having in 1819 become bankrupt) had in 1833 conveyed to the lessor of the plaintiff. In answer to this it was proposed on the part of the defendant to shew that the company had not the legal estate in 1818. This evidence

the learned Judge rejected on the ground that the defendants, who also claimed as subsequent lessees under the company, could not deny the title. If this is the general state of the facts of the case, we think the learned Judge was mistaken.

DOE *v.* WAINWRIGHT, H. T. 1837. K. B. 1 *N. & P.* 8; S. C. 5 *Ad. & E.* 520.

A copy of the feoffment is evidence without calling the attesting witness.

ON the sale of premises to the defendant's landlord, a feoffment was delivered by the vendor, and the question being as to the premises sought to be recovered by the lessor of plaintiff being parcel of the premises so conveyed, notice had been given to produce the feoffment, which not being done, an abstract thereof was tendered, there being no proof of any copy ever having existed.

The Court held, that it was admissible without calling the attesting witness; and, that it not being necessary to prove the feoffment, neither was it necessary to prove the livery of seisin.

(*e*) DAMAGES.

ROBINSON *v.* LEAROYD, T. T. 1840. Ex. 7 *M. & W.* 48.

In an action for double value in holding over a room, in estimating, the value of the purpose for which the room was used cannot be included.

DEBT under the stat. 4 Geo. 2, c. 28, s. 1, by the owner of a woollen mill and premises to recover the double yearly value thereof against the defendant, his tenant, who had held over after notice to quit. It appeared that the plaintiff, being the owner of a mill containing a steam-engine, let to the defendant a room in it, with the use of steam power, furnished by means of a shaft revolving in the room. The room and steam power were let at an entire annual sum. The defendant having held over the premises after notice to quit—

The Court held, that, in estimating the double value in an action against him under the stat. 4 Geo. 2, c. 28, the value of the steam power was to be excluded.

Land-Tax*.

ATTORNEY-GENERAL *v.* HILL, H. T. 1837. Ex. 2 *M. & W.* 160.

Crown dockyards are not assessable to the land-tax.

THIS was an information for trespass and intrusion by the defendants, by distraining certain goods and chattels of the king's dock-

* The Court, upon summary application, made an order upon the commissioners to compel a due assessment of land-tax. (*Attorney-General* v. *Land Tax Commissioners*, M. T. 1823, Ex., 12 Price, 647). Semble, that a broker who, when receiving rent under a distress, deducts a sum purporting to be for land-tax, is not to be considered as *allowing* the land-tax so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted. (*Saunderson* v. *Hanson*, H. T. 1828, N. P., 3 C. & P. 314). The Court will not declare the land-tax on an estate to have been redeemed merely for the benefit of a trustee for sale, and to supply an alleged defect of title, although such redemption has in fact taken place. (*Ex parte Sparkes*, T. T. 1824, Ex., 1 M'Clel. 518). An agreement by tenant "to pay all taxes," includes land-tax. (*Amfield* v. *White*, 1825, N. P., 1 Ry. & M. 246).

yard at Depford, to which the defendants pleaded the general issue. A verdict was taken for the Crown for 58*l.* 2*s.* damages, subject to the opinion of the Court on a case, which stated that the distress in question had been made for land-tax on the dockyard at Deptford, on the 26th of November, 1835.

Per Cur.—We are of opinion, that the assessment can have no effect on the property of the Crown. The goods taken on this distress are the goods of the Crown, and the taking of them has subjected the party to an action of trespass at the suit of the Crown. If we were to determine that the land-tax assessment attached on this land, we should determine that the goods and chattels of the king's palaces of Whitehall and St. James's might be taken for the land-tax, which would be a very absurd decision.

GLATTEN LAND-TAX, *In re*, T. T. 1840. Ex. 6 *M. & W.* 689.

The 1 & 2 Vict. c. 58, does not apply to a case of a double rating in different parishes.

IN this case—

The Court held, that the stat. 1 & 2 Vict. c. 58, s. 2, (enabling the Court of Exchequer to call upon commissioners of land-tax to appear and maintain, or to relinquish, their assessments, in cases where any person has been rated cumulatively in two divisions, parishes, or places), applies only to cases in which two separate and distinct bodies of commissioners, acting for different dictricts, have respectively assessed the applicant, and not to the case of a double rating in separate parishes by the same body of commissioners. The remedy in the latter case is by appeal under 38 Geo. 3, c. 5.

GLATTEN LAND-TAX, *In re*, H. T. 1839. Ex. 4 *M. & W.* 570.

An assessment in a wrong parish is no ground for setting aside a levari facias.

IN 1824, M. purchased lands in the parish of A., which adjoined the parish of B.; the lands had always been assessed to the land-tax in A., and, in 1826, M. paid for these lands to the collector of A., and continued to do so. In the same year M. was called upon by the collector of B. to pay for the same lands, which he refused to do, and in 1828 his lands were distrained upon for land-tax for two years and a half due to the collector of B. M. then brought an action of trespass against the assessors of B., and twice obtained a verdict on the ground that his lands ought not to be assessed in B. The assessors of B. still continued the assessment there, and in January, 1837, three writs of levari facias issued out of this Court, directed to the sheriff of Huntingdon, to levy upon the goods of the tenant of M. for three years' land-tax, due to the parish of B. in respect of these lands in A. These writs were executed in February in the same year, and the money raised and paid over to the Crown. Upon a motion to set aside the levari facias in 1838—

The Court refused to do so, as there had been no wrongful act in the execution of them, and the sheriff was justified in acting in obedience to the writs.

BISHOP OF ROCHESTER *v.* BRIDGES, H. T. 1831. K. B. 1 *B. & Ad.* 847.

With respect to ecclesiastical possessions, if the land-tax be

AFTER redemption of the land-tax by sale of part of the ecclesiastical possessions, the bishop, in consideration of the surrender of a prior lease, re-granted the premises; but the land-tax was not

added to the ancient rent reserved, as required by the 42 Geo. 3, c. 116, s. 88.

not added to the ancient rent reserved, according to the 42 Geo. 3, the lease will be voidable.

The Court held, that such a lease was voidable by his successor, although in fact the land-tax had been regularly paid; and that the former lease having been surrendered by deed, it was not revived upon the avoidance of the latter lease.

WARD *v.* CONST, H. T. 1830. K. B. 10 *B. & C.* 635.

Under the 38 Geo. 3, and 42 Geo. 3, the landlord is entitled to recover from his tenant the proportion of the tax imposed.

IN this case it appeared that, in consideration of a premium and of repairs, premises were demised for a term of ninety-nine years, at a rent of 25*l.* per annum, being of the value at a rack-rent of 120*l.* per annum; and the landlord subsequently purchased the land-tax.

The Court held, that the Land-tax Act at the time of the demise (38 Geo. 3, c. 5, s. 4) imposing the charge on all persons having and holding lands, applied both to a party receiving the profits to a limited extent, and also to another receiving the residue; and that in the principal case therefore the landlord was to be considered as having and holding to the extent of 25*l.* per annum, and the tenant as to the residue, the Land-tax Redemption Act (42 Geo. 3, c. 116, s. 123) providing that the person having an interest in reversion, purchasing the land-tax, should be entitled to receive the yearly sum issuing out of the premises equal in amount to the land-tax redeemed. The plaintiff, as landlord, was entitled to recover from the tenant the proportion of the tax imposed upon his interest in the annual value of the premises.

GIBBS *v.* STEAD, T. T. 1828. K. B. 8 *B. & C.* 528.

The land-tax is due at any period of the quarter before the quarter-day, but cannot be distrained for without a personal demand;

IN an action of trespass, it appeared that the collector, on the 22nd March, applied at the premises charged for four quarters' land-tax, the last being for the quarter ending on the 25th March, in the absence of the party, and, it not being paid, immediately distrained for the whole.

The Court held, 1st, that the assessment for the last quarter was to be considered as due at any period in that quarter before the 25th March, before which the collector is bound to complete the collection of all the sums due in that quarter; but, 2ndly, that the distress was unlawful, the demand not having been made on the party himself; a reasonable interval ought to have elapsed, to give the party an opportunity of complying with the demand, without which he would not be guilty of any default.

WARNER *v.* POTCHETT, M. T. 1832. K. B. 3 *B. & Ad.* 921.

and upon the sale of land there can be no distress for the land-tax, until the ascertainment of the precise quantity of land, and the portion of the rent reserved.

UPON a sale by an ecclesiastical corporation—

The Court held, 1st, that it must be taken to have been intended that both the fee and the rents, &c., (where the party has only a reversion expectant on a lease), should be sold together, and that a sale merely of the reversionary interest was not authorized by the act; and 2ndly, that, until the ascertainment of the precise quantity of land, and the portion of the reserved rent to be sold under the 88th section, there could be no right to distrain for the land-tax redeemed, as an addition to and part of all the rent.

CHARLETON *v.* ALWAY, E. T. 1840. Q. B. 3 *P. & D.* 618; S. C. 11 *Ad. & E.* 993.

A warrant of distress for the tax due to different parties is bad.

THE commissioners issued a distress warrant for the land-tax on rectorial and vicarial tithes in one undivided sum, the former having been redeemed, and belonging to a different party, although both were occupied by the plaintiff.

The Court held it irregular; and that the plaintiff, having paid the latter, which were only due, was not bound to appeal to the commissioners, but might treat the assessment as a nullity, and that the distress could not be applied to the vicarial tithe of the current quarter, which had not been demanded, nor any appeal day named with reference to that rate.

FOSS *v.* RACINE, M. T. 1838. Ex. 7 *D. P. C.* 53; S. C. 4 *M. & W.* 419; S. C. 8 *C. & P.* 699.

Under a distress, the collector cannot break open an outer door without a constable.

THE stat. 38 Geo. 3, c. 5, s. 17, provides, "That it shall be lawful for the collector to break open, in the day-time, any house; and, upon warrant under the hands and seals of any two or more of the said commissioners, any chest, trunk, box, or other thing where any such goods are, calling to their assistance the constables, tithingmen, or headboroughs within the counties, ridings, cities, towns, or places where any refusal or neglect shall be made."

The Court held, that the collector was not empowered to break open a house without calling to his assistance a constable.

DOE *d.* STANSBURY *v.* ARKWRIGHT, E. T. 1833. K. B. 2 *Ad. & E.* 183; S. C. 1 *N. & M.* 731.

Land-tax assessments are not evidence of seisin.

IN ejectment, it appeared that the land-tax assessments were irregularly kept; that when the estate remained in the same family, the assessments were usually continued in the name of the ancestor, and it was not changed until the estate was sold, or went to another family.

The Court held, that the land-tax assessments were not evidence of seisin of the party assessed.

Larceny*.

I. RELATIVE TO THE TAKING NECESSARY TO CONSTITUTE THE OFFENCE, p. 481.

* By 7 & 8 Geo. 4, c. 29, intituled "An Act for consolidating and amending the Laws relative to Larceny,"

Sect. 1. Commencement of act.

Sect. 2. Distinction between grand and petty larceny abolished.

Sect. 3. Punishments for simple larceny.

Sect. 4. The Court may free all offences within this act, order hard labour or solitary confinement.

Sect. 5. Stealing public or private securities for money, or warrants for goods, felony, and punishment according to the circumstances like stealing goods; term "valuable security," throughout this act, how to be interpreted.

Sect. 6. Robbery from the person, stealing from the person, assaults with intent to commit robbery, and demands accompanied with menaces or force.

II. RELATIVE TO THE INTENTION, p. 481.

III. RELATIVE TO THE VALUE, p. 482.

Sect. 7. Obtaining money, &c. by threatening to accuse a party of an infamous crime.

Sect 8. Sending letters containing menacing demands, or threatening to accuse a party of an infamous crime to extort money, &c.

Sect. 9. What shall be deemed an infamous crime.

Sect. 10. Sacrilege, when capital.

Sect. 11. Burglary, capital.

Sect. 12. Housebreaking and stealing in a house, when capital.

Sect. 13. What buildings only are part of a house for capital purposes.

Sect. 14. Robbery in any building within the same curtilage as the house, but not privileged as part of the house.

Sect. 15. Robbery in a shop, warehouse, &c.

Sect. 16. Stealing certain goods in process of manufacture.

Sect. 17. Stealing goods from a vessel in port, river, or canal, &c.

Sect. 18. Plundering any part of the tackle or cargo of a shipwrecked vessel.

Sect. 19. Persons in possession of shipwrecked goods not giving a satisfactory account.

Sect. 20. If any person offers shipwrecked goods for sale, the goods may be seized, &c.

Sect. 21. The stealing, &c. of records and other proceedings of courts of justice.

Sect. 22. The stealing &c. of wills.

Sect. 23. The stealing of writings relating to real estate.

Sect. 24. These provisions as to wills and writings not to lessen any remedy which the party aggrieved now has.

Sect. 25. Stealing horses, cows, and sheep.

Sect. 26. What acts as to deer in forests, chases, purlieus, or inclosed grounds, to be deemed felony. What acts as to deer in uninclosed grounds of forests, chases, or purlieus, punishable summarily. Second offence as to deer (after a first offence punished summarily), to be also deemed felony.

Sect. 27. Suspected persons found in possession of venison, &c., and not satisfactorily accounting for, in case they cannot be convicted, how justices of the peace may proceed.

Sect. 28. Setting engines for taking deer, or pulling down park fences.

Sect. 29. Deer-keepers, &c., may seize the guns, &c., of offenders, who, on demand, do not deliver up the same. Resistance to keepers, &c., in the execution of their duty.

Sect. 30. Killing &c. hares or conies in a warren in the night-time. The like in the day-time.

Sect. 31. Stealing dogs, or stealing beasts or birds ordinarily kept in confinement, and not the subjects of larceny.

Sect. 32. Persons found in possession of stolen dogs, &c., liable to penalties.

Sect. 33. Killing pigeons.

Sect. 34. Taking fish in any water situate in land belonging to a dwelling-house; in any private fishery elsewhere. Provisions respecting anglers.

Sect. 35. The tackle of fishers may be seized. Angler, on seizure of his tackle, exempt from penalty.

Sect. 36. Stealing oysters or oyster-brood from oyster-beds. Dredging for oysters within the limits of any oyster fishery.

Sect. 37. Stealing, or severing with intent to steal, from certain mines.

Sect. 38. Stealing or cutting, &c., with intent to steal trees, shrubs, &c., growing in certain situations, felony, if the value exceeds 1*l.* Stealing or cutting, &c., with intent to steal trees, shrubs, &c., growing elsewhere, felony, if the value exceeds 5*l.*

Sect. 39. Stealing or cutting, &c., with intent to steal trees, shrubs, &c., wheresoever growing, and of any value above 1*s.*, punishable on summary conviction for first and second offence; third offence, felony.

Sect. 40. Stealing, &c., any live or dead fence, wooden fence, stile, or gate.

Sect. 41. Suspected persons in possession of wood, &c., not satisfactorily accounting for it.

Sect. 42. Stealing, &c., any fruit or vegetable production in a garden, &c., punishable in summary conviction for first offence; second offence, felony.

Sect. 43. Stealing, &c., vegetable productions, not growing in gardens, &c., punishments for first, second, and subsequent offences.

IV. RELATIVE TO WHAT AMOUNTS TO, AND OF THE KIND OF PROPERTY IN RESPECT OF WHICH LARCENY MAY BE COMMITTED.

(*a*) In general, p. 482.

(*b*) In particular.

1. *With respect to Agistment*, p. 482.
2. *With respect to Bills and Notes*, p. 483.
3. *With respect to Bailments*, p. 483.
4. *With respect to Finder of Property*, p. 483.
5. *With respect to Letters*, p. 483.
6. *With respect to Lodgings*, p. 483.
7. *With respect to Mines*, p. 483.
8. *With respect to obtaining Goods*, p. 483.
9. *With respect to Change of Money*, p. 483.
10. *With respect to Ring-dropping*, p. 483.

Sect. 44. Stealing, &c., glass, woodwork, or fixtures of any kind from buildings, and metal fixtures from grounds.

Sect. 45. Tenants and lodgers stealing any property from houses or apartments let to them.

Sect. 46. Clerks or servants, &c., stealing property of their masters.

Sect. 47. Clerks or servants receiving any money, &c., on their master's account, and embezzling it, to be deemed to have feloniously stolen it.

Sect. 48. Distinct acts of embezzlement may be charged in the same indictment. As to allegation and proof of the property embezzled.

Sect. 49. Agents embezzling money entrusted to them, to be applied to any special purpose, or embezzling any goods or valuable securities entrusted to them for safe custody, or for any special purpose, guilty of a misdemeanor.

Sect. 50. Not to affect trustees or mortgagees, nor bankers, &c., receiving money due on securities, or disposing of securities on which they have a lien.

Sect. 51. Factors, pledging for their own use any goods, or documents relating to goods, entrusted to them for the purpose of sale, guilty of a misdemeanor. Not to extend to cases where the pledge does not exceed the amount of their lien.

Sect. 52. These provisions as to agents not to lessen any remedy which the party aggrieved now has.

Sect. 53. Obtaining money, &c., by false pretences, a misdemeanor. No acquittal on the ground that the case proved amounts to larceny.

Sect. 54. Where the orignal offence is felony, the receivers of stolen property may be tried either as accessories after the fact or for a substantive felony.

Sect. 55. Where the original offence is a misdemeanor, receivers may be prosecuted for a misdemeanor,

Sect. 56. All receivers may be tried where the principal is triable, or where the property is found in their possession, as well as where the receiving takes place.

Sect. 57. The owner of stolen property prosecuting thief or receiver to conviction shall have restitution of his property, subject to certain exceptions.

Sect. 58. Taking a reward for helping to the recovery of stolen property, without bringing the offender to trial.

Sect. 59. What advertising, or printing, or publishing reward for the return of stolen property, punishable by forfeiture of 50*l*.

Sect. 60. Receiving stolen property, how punishable, where the original offender is punishable on summary conviction.

Sect. 61. Principals in the second degree, and acessories. Abettors in misdemeanors.

Sect. 62. Abettors in offences punishable on summary conviction.

Sect. 63. A person in the act of committing any offence may be apprehended without a warrant. A justice, upon good grounds of suspicion, proved on oath, may grant a search warrant. Any person to whom stolen property is offered may seize the party offering it.

Sect. 64. Limitation as to summary proceedings. Competency of witnesses.

V. RELATIVE TO THE PERSONS BY WHOM LARCENY MAY BE COMMITTED.

(*a*) By clerks or servants, p. 484.

(*b*) By bailee, p. 484.

(*c*) By wife, p. 484.

VI. RELATIVE TO THE OFFENCE BEING COMMITTED IN PARTICULAR PLACES, p. 484.

VII. RELATIVE TO THE INDICTMENT, p. 484.

VIII. RELATIVE TO THE PLEAS, p. 485.

IX. RELATIVE TO THE EVIDENCE, p. 485.

X. RELATIVE TO THE JUDGMENT, p. 486.

XI. RELATIVE TO THE RESTITUTION, p. 486.

I. RELATIVE TO THE TAKING NECESSARY TO CONSTITUTE THE OFFENCE*.

II. RELATIVE TO THE INTENTION†.

Sect. 65. Mode of compelling the appearance of persons punishable on summary conviction.

Sect. 66. Application of forfeitures and penalties on summary conviction.

Sect. 67. If a person summarily convicted shall not pay, &c., the justice may commit him. Scale of imprisonment.

Sect. 68. Justices may discharge the offender in certain cases.

Sect. 69. Pardon for non-payment of money.

Sect. 70. A summary conviction shall be a bar to any other proceeding for the same cause.

Sect. 71. Form of conviction.

Sect. 72. Appeal.

Sect. 73. No certiorari, &c.

Sect. 74. Convictions to be returned to the quarter sessions. How far evidence in future cases.

Sect. 75. Venue in proceedings against persons acting under this act. Notice of action. General issue, &c.

Sect. 76. This act not to extend to Scotland or Ireland, except in two cases.

Sect. 77. To extend to offences committed at sea.

* There must be a taking, either actual or constructive, to constitute larceny: actual, where the goods have been taken out of the owner's possession against his will or without his consent; constructive, where the owner delivers the goods, but either does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud, and in pursuance of a previous intent to steal them.

A. was indicted at common law for simple larceny in stealing in Middlesex a quantity of lead. It appeared that the lead was stolen from the roof of the church of Ives, in Buckinghamshire. The prisoner was indicted at the Central Criminal Court, which has jurisdiction in Middlesex, but not in Buckinghamshire:—Held, that he could not be convicted there; on the ground, that the original taking not being a larceny, but created by statute a felony, the subsequent possession could not be considered as larceny. (*Rex* v. *Millar*, 1837, C. C. C., 7 C. & P. 665).

† A party hired to drive sheep to a fair, and converting them held, to be properly convicted of stealing; the jury being of opinion, that, at the time he received them, he intended to convert them to his own use. (*Rex* v. *Stock*, 1825, 1 Moo., C. C. 87).

III. RELATIVE TO THE VALUE*.

IV. RELATIVE TO WHAT AMOUNTS TO, AND OF THE KIND OF PROPERTY IN RESPECT OF WHICH LARCENY MAY BE COMMITTED†.

(*a*) In general.

(*b*) In particular.

1. *With respect to Agistment*‡.

* Though to make a thing the subject of an indictment for larceny it must be of some value, and stated to be so in the indictment, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least. (*Reg.* v. *Morris*, 1840, C. C. C., 9 C. & P. 347).

† If A. and B. are the owners of adjoining mines, and A., asserting that a certain air-way belongs to him, directs his workmen to stop it up, and they acting bonâ fide, and believing that A. has a right to give such an order, do so, they are not guilty of felony within the stat. 7 & 8 Geo. 4, c. 30, s. 6, for stopping up the air-way of a mine, even though A. knew that he had no right to the air-way; but, if either of the workmen knew that the stopping of the air-way was a malicious act of his master, such workman would be guilty of the felony. (*Reg.* v. *James*, 1837, N. P., 8 C. & P. 131). Where a prisoner had lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out, it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied. The Judges held this was a complete asportation. (*Rex* v. *Walsh*, 1824, 1 Moo. C. C. 14). So, getting a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it be taken animo furandi, is a larceny, for the servant has no authority to part with it but to the right person. (*Rex* v. *Longstreth*, 1826, 1 Moo. C. C. 137). But, if one employed to carry goods for hire appropriate them to his own use, but does not break bulk, this is no larceny, although the person so employed were not a common carrier, but was only employed in this particular instance. (*Rex* v. *Fletcher*, 1831, N. P., 4 C. & P. 545). And, where a man went to bed with a prostitute, having put his watch in his hat on a table, the woman stole the watch while the man was asleep:—Held, that the offence was that of stealing in the dwelling-house and not of stealing from the person. (*Rex* v. *Hamilton*, 1837, C. C. C., 8 C. & P. 49). So, if a man takes a letter, supposing it to belong to himself, and, on finding it does not, appropriates to himself any property it contains, this appropriation does not make him answerable for larceny; there being no animus furandi when he first received the letter. (*Rex* v. *Mucklow*, 1827, 1 Moo. C. C. 160). So, where A., the owner of a boat, was employed by B., the captain of a ship, to carry a number of wooden staves in his boat; B.'s men were put into the boat, but were under the control of A., who did not deliver all the staves, but took one of them away to the house of his mother:—Held, that this was a bailment of the staves to A. and not a charge only; and that a mere non-delivery of the staves would not have been a larceny in A.; but that, if A. separated one of the staves from the rest and carried it to a place different from that of its destination, with intent to appropriate it to his own use, that was equivalent to a *breaking* of bulk, and therefore would be sufficient to constitute a larceny. (*Rex* v. *Howell*, 1835, N. P., 7 C. & P. 325). The luggage of a passenger going by a steam-boat is within the words "goods or merchandize" in the 17th section of the stat. 7 & 8 Geo. 4, c. 29, which relates to property stolen from any vessel in any navigable river. (*Rex* v. *Wright*, 1835, C. C. C., 7 C. & P. 159). A. went to the shop of B. and asked for shawls for Mrs. D. to look at, B. gave her five, she pawned two, and three were found at her lodgings. Mrs. D. was not called as a witness:—Held, that A. on this evidence could not be convicted of a larceny in stealing the goods of B. (*Rex* v. *Savage*, 1831, N. P., 5 C. & P. 143).

‡ Where the prisoner had received a horse from the prosecutor to agist, and had been paid for one week:—Held, that the subsequent sale of it did not amount to larceny. (*Rex* v. *Smith*, 1836, 1 Moo. C. C. 473).

2. *With respect to Bills and Notes**.

3. *With respect to Bailments*†.

4. *With respect to the Finder of Property*‡.

5. *With respect to Letters*§.

6. *With respect to Lodgings.* See post, div. VII., *Indictment.*

7. *With respect to Mines* ‖.

8. *With respect to obtaining Goods*¶.

9. *With respect to changing Money***.

10. *With respect to Ring-dropping*††.

* A., in consequence of seeing an advertisement, applied to B. to raise money for him, B. said he would procure him 5000*l.*, and produced from his pocket-book ten blank 6*s.* bill stamps, across each of which he wrote, "accepted payable at Messrs. P. & Co., 189, Fleet-street, London," and signed his name. B., who was present, took up the stamps, and nothing was said as to what was to be done with them. Afterwards, bills of exchange for 500*l.* each were drawn on those stamps, and B. put them into circulation:—Held, that these stamps, with the acceptances thus written upon them, were neither "bills of exchange," "orders for the payment of money," nor "securities for money;" and held also, that a charge of larceny against B. for stealing the stamps, and for stealing the paper on which the stamps were, could not be sustained, as this was no larceny. (*Rex* v. *Hart*, 1833, O. B., 6 C. & P. 106).

† Where the prisoner hired a horse and gig of the prosecutor, which he immediately offered for sale:—Held, that, there having been no actual conversion of the property, the prisoner could not be convicted of larceny. (*Rex* v. *Brooks*, 1838, N. P., 8 C. & P. 295).

‡ If a person picks up a thing where he knows that he can immediately find the owner, and, instead of restoring it to the owner, converts it to his own use, this is a larceny. (*Rex* v. *Pope*, 1834, N. P., 6 C. & P. 346).

§ If a person from idle curiosity, either personal or political, opens a letter addressed to another person, and keeps the letter, this is no larceny, even though a part of his object may be to prevent the letter from reaching its destination. (*Reg.* v. *Godfrey*, 1838, N. P., 8 C. & P. 563).

But if A. ask B., who is not his servant, to put a letter in the post, telling him that it contains money, and B. break the seal and abstract the money before he puts the letter in the post, he is guilty of larceny. (*Rex* v. *Jones*, 1835, C. C. C., 7 C. & P. 151. See also, ante, p. 482).

‖ Removal by miners of ore from the heaps of other miners to their own, in order to increase their own wages, without being taken away from the owners:—Held not to amount to larceny. (*Rex* v. *Webb*, 1835, 1 Moo. C. C. 431). See also, ante, p. 482.

¶ A person by false pretences induced a tradesman to send by his servant to a particular house goods of the value of 2*s.* 10*d.*, with change for a crown-piece. On the way he met the servant, and induced him to part with the goods and change, giving him a crown-piece, but which afterwards was found to be bad. Both the tradesman and servant swore that the latter had no authority to part with the goods or change without receiving the crown-piece in payment, though the former admitted that he intended to sell the goods, and never expected them back again:—Held, that the offence amounted to larceny. (*Rex* v. *Small*, 1837, C. C. C., 8 C. & P. 46).

** A. went to a shop and asked a boy there to give him change for a half-crown, the boy gave him two shillings and six-pennyworth of copper. The prisoner held out a half-crown, which the boy touched, but never got hold of, and the prisoner ran away with the 2*s.* and the copper:—Held, a larceny of the 2*s.* and the copper. (*Rex* v. *Williams*, 1834, N. P., 6 C. & P. 390).

†† Where, in a case of ring-dropping, the prosecutor parted with his money in the purchase of the prisoner's share:—Held not to be a case of larceny. (*Reg.* v. *Wilson*, 1837, N. P., 8 C. & P. 111).

V. RELATIVE TO THE PERSONS BY WHOM LARCENY MAY BE COMMITTED.

(*a*) By clerks or servants*.

(*b*) By bailee†.

(*c*) By wife‡.

VI. RELATIVE TO THE OFFENCE BEING COMMITTED IN PARTICULAR PLACES§.

VII. RELATIVE TO THE INDICTMENT‖.

Rex *v.* Somerton, M. T. 1827. K. B. *7 B. & C.* 463.

An indictment that "one A.

An indictment on the statute 3 Geo. 4, c. 38, s. 2, (which provides that servants stealing goods from their masters shall be subject

* The driver of a glass-coach hired for the day is not the servant of the party hiring it, so as to bring him within the statute relating to larceny by servants, 7 & 8 Geo. 4, c. 29, s. 46. (*Rex* v. *Haydon*, 1836, C. C. C., 7 C. & P. 445). But, if a man who is hired to drive cattle sell them, it is larceny, for he has the custody only, not the right to the possession. His possession is the owner's possession, though he is a general drover, at least if he is paid by the day. (*Rex* v. *M'Namee*, 1832, 1 Moo. C. C. 368). So, where the carter of the prosecutor took, beyond what was allowed for provender, two trusses of hay, which the other prisoner, an ostler at a public-house where they stopped, removed from the cart:—Held, to amount to a stealing by one and a receiving by the other; aliter, if it had been part of the allowed provender taken from the cart and so in the owner's possession. (*Rex* v. *Gruncell*, 1839, C. C. C., 9 C. & P. 365). So, if a man and the owner's wife jointly take away the husband's goods, it may be larceny in the man though he was acting jointly with the wife. (*Rex* v. *Tolfree*, 1829, 1 Moo. C. C. 243). So, if a person, not being the servant of the party who intrusts him, receive a parcel containing notes to take to a coach-office, and abstract the notes on his way there, and apply them to his own use, he is guilty of larceny. (*Reg.* v. *Jenkins*, 1839, C. C. C., 9 C. & P. 38). And, if a servant take his master's property, and hand it over to another as a gift, it is as much a felony as if he sell it, or take it to a pawnbroker's and pledge it. (*Reg.* v. *White*, 1840, C. C. C., 9 C. & P. 344). So, where the prisoner, occasionally employed as a clerk, received a cheque, to be handed over to a creditor, but appropriated it to his own use, held to amount to larceny of the cheque. (*Rex* v. *Metcalf*, 1835, 1 Moo. C. C. 433).

† If the owner of goods employ a person not in his service to take them to a particular place, shew them to a customer, and bring them back, without authorizing him to sell them to, or leave them with, the customer, and he, instead of taking the goods to the specified place, sell them for his own advantage, he will be guilty of larceny, inasmuch as the felonious intent came upon him at a time when he had the custody only and not the possession of the goods. (*Reg.* v. *Harvey*, 1840, C. C. C., 9 C. & P. 353).

‡ Stealing by a wife of a member of a friendly society money of the society deposited in a box in the husband's custody, kept locked by the stewards, is not larceny. (*Rex* v. *Willis*, 1833, 1 Moo. C. C. 375).

§ Where goods were stolen in one county on 4th November, 1823, and brought into a second on the 17th March, 1824:—Held, that the interval did not prevent the offence from being a larceny in the latter county. (*Rex* v. *Parkin*, 1824, 1 Moo. C. C. 45). Where larceny was committed in Jersey, held, that the possession of the stolen property within the kingdom did not make it larceny here. (*Rex* v. *Prowes*, 1832, 1 Moo. C. C. 349). A person who steals goods in France cannot be tried in England for the offence, though he be found in possession of the stolen property there. (*Reg.* v. *Madge*, 1839, C. C. C., 9 C. & P. 29).

‖ An indictment under 7 & 8 Geo. 4, c. 29, s. 15, for stealing in a shop, &c., must allege that the prisoner stole the goods therein; an averment that the goods

to transportation for fourteen years) stated that the party charged "on the 1st March &c., being then and there servant to one J. H., on the same day, and in the year aforesaid &c., the goods and chattels of the said J. H. feloniously did steal," &c.

B., being then and there the servant of C. D.," is sufficient to charge A. B. as the servant of C. D.

The Court held, that the fact of the party charged being a servant at the time when the offence was committed appeared with sufficient certainty, and that the judgment of fourteen years' transportation was authorized by the statute.

VIII. RELATIVE TO THE PLEAS. See tit. *Indictment.*

IX. RELATIVE TO THE EVIDENCE*.

were in the shop, and that the prisoner stole them, is not enough. (*Reg.* v. *Smith*, 1837, N. P., 2 M. & Rob. 135). In an indictment against a servant of the West India Dock Company for stealing a quantity of canvas and hessen belonging to the company, from their warehouses, it was held sufficient to state the property to be "the goods and chattels of the West India Dock Company;" and not necessary, notwithstanding the words of the 1 & 2 Will. 4, c. 11, s. 133, to allege, in addition, that it was feloniously taken from the said company. (*Reg.* v. *Stokes*, 1837, N. P., 8 C. & P. 141). So, in an indictment for stealing property which had belonged to a deceased person, who appointed executors, who would not prove the will, it was held that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration with the will annexed; because the rights of an administrator only commence from the date of the letters, as distinguished from those of an executor, which commence, not from the granting of the probate, but from the death of the testator. (*Rex* v. *Smith*, 1835, N. P., 7 C. & P. 147). In an indictment for larceny of goods, the property of a peer, who is a baron, the goods may be laid as the goods and chattels of "G. J. R., Lord D.," without styling him Baron D., although the proper way is to describe a peer is by his Christian name, and his degree in the peerage, as duke, earl, baron, or the like. (*Reg.* v. *Pitts*, 1839, N. P., 8 C. & P. 771). In larceny, the goods of a ready-furnished lodging must be described as the lodger's goods, not as the goods of the original owner. (*Rex* v. *Brunswick*, 1824, 1 Moo. C. C. 26). But an indictment on 3 & 4 Will. & M. c. 9, s. 5, ("stealing in lodgings,") need not state by whom the lodgings were let, and may be stated either according to the fact or legal operation, and a mistake may in this respect be rejected as surplusage. (*Rex* v. *Healey*, 1824, 1 Moo. C. C. 1). And where, on an indictment for stealing in furnished lodgings, the prisoner, a feme coverte, was living separate from her husband, and he in no way assented to the contract:—Held, that the letting need not be stated to be to the husband according to its legal operation. (*Rex* v. *Hurrell*, 1825, N. P., 1 Ry. & M. 296). Where the wife of A. was employed by her father to sell sheep, and receive the amount at K.; she did so; but before she left K., a 5*l.* note, which she received in payment for the sheep, was stolen from her:—Held, that, in an indictment for a larceny, the note was properly described as the property of the husband. (*Rex* v. *Roberts*, 1837, N. P., 7 C. & P. 485). Where, on a trial of a man and woman for larceny, it appears by the evidence that they addressed each other as husband and wife, and passed and appeared as such, and were so spoken of by the witnesses for the prosecution, it will be for the jury to say whether they are satisfied that they are in fact husband and wife, even though the woman pleaded to the indictment, which described her as a "single woman." In such a case a female prisoner ought not to be indicted as a single woman. (*Reg.* v. *Woodward*, 1838, N. P., 8 C. & P. 561). In order to warrant a sentence of transportation for life, on an indictment for a larceny after a previous conviction for felony, the indictment need not conclude contra formam statuti. (*Reg.* v. *Blea*, 1839, N. P., 8 C. & P. 735).

* Whether ground be properly described as a "garden," within the 38th section of the 7 & 8 Geo. 4, is a question for the jury. The words "plant," and "vegetable production," in sect. 42, do not apply to young fruit trees. (*Rex* v. *Hodges*, 1829, N. P., 1 M. & M. 341). On an indictment on the stat. 7 & 8 Geo. 4, c. 29, s. 23, for

X. RELATIVE TO THE JUDGMENT. See ante, tit. *Indictment.*

XI. RELATIVE TO THE RESTITUTION. See ante, tit. *Indictment.*

Latitat (abolished). See post, tit. *Process.*

Lease.

See tits. *Covenant—Deed—Distress—Ejectment—Landlord and Tenant—Rent—Statutes—Use and Occupation—Waste—Ways—Will.*

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stealing writings relating to real estate, the jury must be satisfied that the defendant took them under such circumstances as would have amounted to larceny, if the writings in question had been the subject of larceny. (*Rex* v. *John*, 1835, N. P., 7 C. & P. 324). If the only evidence against a prisoner indicted for larceny be that the goods were found in his possession sixteen months after they had been stolen, (*Rex* v. ——, 1826, N. P., 2 C. & P. 459), or three months, the Judge will direct an acquittal, without calling upon him for his defence. (*Rex* v. *Adams*, 1829, N. P., 3 C. & P. 600). The question, of what is or is not a recent possession of stolen property, is to be considered with reference to the nature of the articles stolen. Therefore, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, are lost, and were in the possession of the prisoner twelve months after their being stolen, and still in the same state, it was held that this was a possession sufficiently recent to call on the prisoner to shew how he came by the property. (*Rex* v. *Partridge*, 1836, N. P., 7 C. & P. 551). Where the prisoner selected as for purchase a pin, and it was set aside for him, and he afterwards was seen to take it away with him, in the absence of the shopman; a bill was, however, sent, including the price of the pin:—Held, that the jury were to say whether it was taken with a felonious intent, or whether credit was not given for it. (*Reg.* v. *Box*, 1839, C. C. C., 9 C. & P. 126). Upon a defence by a servant, charged with stealing, that he pledged the property with intent to redeem and replace it:—Held, that it was for the jury to say whether taken originally with a felonious intent. (*Reg.* v. *Phetheon*, 1840, C. C. C., 9 C. & P. 552). So, to justify the conviction of a receiver, the jury must be satisfied that the property had been stolen by some other person, to the knowledge of the prisoner; and there should be some evidence to shew such was the case. (*Rex* v. *Densley*, 1834, N. P., 6 C. & P. 399).

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XII. RELATIVE TO THE TERMINATION OF.

(*a*) By whom and on whom binding, p. 500.

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I. RELATIVE TO WHO MAY BE LESSORS OR LESSEES.

Hayward *v.* Haswell, H. T. 1837. K. B. 1 *N. & P.* 411.

The party granting a lease must have the power to do so.

An agreement, whereby C. P. H. agreed to grant a lease at the time after mentioned of certain premises for a term of fifty-nine and a quarter years, at a certain rent, payable quarterly; and also agreed to erect, with the approbation of the surveyor of the Merchant Tailors' Company, certain buildings on the ground intended to be demised; and whereby C. H. agreed to accept a lease when tendered to her by the said C. P. H., and erect certain other buildings; it being also agreed between the parties, that the lease should be granted by the said C. P. H. immediately after he had obtained his lease of the same premises, under an agreement with the Merchant Tailors' Company, and should contain, on the part of the lessee, like covenants to those contained in the original lease to him, and such other covenants as are usual and common in like leases.

The Court held, 1st, that the instrument did not amount to a

demise; and, 2ndly, as it appeared on the face of the instrument that the party had not, at the time of executing the agreement, power to grant a lease, that it could not operate as such.

VIVIAN *v.* BLOMBERG, M. T. 1836. C. P. 3 *Bing. N. S.* 311; S. C. 3 *Scott,* 681.

A vicar may make a valid and binding lease on his successor, though the prior lease had not expired.

A LEASE by a vicar of messuages in the city of London, not being the habitation of the vicar, and of ground belonging to the same, not above the quantity of ten acres, for twenty-one years from the date thereof, made at a time when there were less than three years of a former lease unexpired—

The Court held was not void under the statutes 13 Eliz. c. 10; 14 Eliz. c. 11; and 18 Eliz. c. 11.

DOE *d.* RICHARDSON *v.* THOMAS, H. T. 1839. Q. B. 1 *P. & D.* 579; S. C. 9 *Ad. & E.* 556.

But a quasi vicar cannot grant a lease for lives, under 32 Hen. 8.

A PERPETUAL curate, whose curacy has been augmented by lands under a grant from Queen Anne's Bounty, made a lease—

The Court held, not to be within the enabling clause of 32 Hen. 8; and even if he were, would be deemed a quasi vicar, and within the proviso of sect. 4, and cannot therefore grant a valid lease for lives without the consent of the ordinary.

BRINGLOE *v.* GOODSON, T. T. 1838. C. P. 6 *Scott,* 502; S. C. 4 *Bing. N. S.* 724.

Where there has been no suspension of the leasing power of the tenant for life, his tenant cannot shew that the estate is in another.

TESTATOR devised lands in trust to his son for life, with power to lease for twenty-one years, and also with power to his executors to raise a sum for payment of debts, by mortgages in fee or for years, and the son by indenture demised the premises to C. for ninety-nine years, if he should so long live; he afterwards in execution of the power executed a lease for twenty-one years to the defendant, and subsequently the executors, in pursuance of their power and with the concurrence of the son, mortgaged the premises to the plaintiff for 1000 years, and who, claiming as assignee of the reversion, brought an action for breach of farm covenants in the lease for twenty-one years by the son to the defendant.

The Court held, that the defendant could not set up as a defence the interest of C., the grantor, for ninety-nine years, there having been no suspension of the leasing power of the tenant for life so far as regarded the grantee of the term under the leasing power of the executors.

DOE *v.* EDWARDS, E. T. 1836. Ex. 1 *M. & W.* 553; S. C. 1 *T. & J.* 1006.

A lease for lives cannot enure to the benefit of a person not then in existence.

UPON a lease to Mrs. E., habendum to her and her heirs for the lives of her son and daughter and a granddaughter of A. E., and the survivor. It appeared that A. E. had a daughter but no granddaughter.

The Court held, that it enured as an estate for the two lives, but not of a person not then in existence.

II. RELATIVE TO THE FORM AND NATURE OF, AND WHETHER AN AGREEMENT OR A LEASE.

REX *v.* ST. MARTIN'S, LEICESTER, M. T. 1834. K. B. 4 *N. & M.* 202; S. C. 2 *Ad. & E.* 210.

A WITNESS stated, that he let a house as agent to his father, who was present, and that the terms were reduced to writing to prevent the possibility of mistake, and signed by the wife of the tenant on purpose to bind her husband, the husband himself not being present, but that the memorandum was not signed by witness nor his father, nor did his father's name appear in any part.

A memorandum not signed by the lessor nor lessee is neither a lease nor an agreement*, but may be looked at for the purpose of parol evidence.

The Court held, that this was neither a lease nor an agreement, but a mere memorandum, to which the witness might refer to refresh his memory; and, upon the witness saying that he had no memory of those things but from the book in which they were entered, without which from his own knowledge he should not have been able to speak to the fact; but, on reading the entry he had no doubt that the fact really happened, this was held sufficient parol evidence of the demise.

DOE *v.* BENJAMIN, T. T. 1838. Q. B. 1 *P. & D.* 440; S. C. 9 *Ad. & E.* 644.

A PARTY being yearly tenant, in the course of a current half-year entered into an agreement with his lessor, the one to let and the other to take a fourteen years' lease, determinable at the option of either at the end of seven years, at a rent payable half-yearly.

An agreement to let and take may amount to a lease;

The Court held it to amount to a lease; although the parties might not contemplate the legal consequences of the surrender of the previous term, and the merger of the accruing rent.

* If a man describe himself in the beginning of an agreement to grant a lease as making it on behalf of another, but in the subsequent part of it say that he will execute the lease, he is personally liable. (*Norton* v. *Herron*, H. T. 1825, N. P., 1 Ry. & M. 229; S. C. 1 C. & P. 648). An agreement by which A. agrees to "let" premises to B. "on lease" for a certain term, at a certain rent, "subject to the stipulations and covenants in the original lease under which he holds," and "to keep the said stipulations in every respect until the said lease shall be granted, which lease when required by B. is to be prepared by A.'s solicitor, but B.'s expense," is a lease and not merely an agreement for one. (*Wilson* v. *Chisholm*, H. T. 1831, N. P., 4 C. & P. 474). So, the following instrument amounts to a lease:—"P. T. agrees to pay F. N. the sum of 140*l.* per annum, in quarterly payments, for the house, &c. at &c., for the term of seven, fourteen, or twenty-one years, at his option, at the end of every seven years. The rent to commence on the 1st of January, 1827." (*Wright* v. *Trezevant*, T. T. 1828, N. P., 1 M. & M. 231; S. C. 3 C. & P. 441). So, a memorandum having a lease stamp, by which A. agrees to let to B. certain lands mentioned in an annexed abandoned lease from A. to C., upon conditions, agreements, &c., contained in the same lease, and by which A. and B. bind themselves to execute a lease similar to such abandoned lease, is itself a valid lease. (*Pearce* v. *Cheslyn*, M. T. 1835, K. B., 5 N. & M. 652.) But an agreement for a demise of a messuage, and an incorporeal hereditament, license to hunt, &c , not under seal:—Held void; and on a declaration upon a parol demise, merely stating that the defendant entered and became possessed of the messuage, right, liberty, &c., without alleging actual enjoyment, the plaintiff could not recover as for use and occupation. (*Bird* v. *Higginson*, H. T. 1835, K. B., 4 N. & M. 505; abridged, post, tit. *Use and Occupation*).

DOE *d.* PEARSON *v.* RIES, T. T. 1832. C. P. 8 *Bing.* 178; S. C. 1 *M. & Scott,* 259.

and an agreement to take the whole of the remaining term amounts to a lease.

AN agreement by A. to let and B. to take for the whole remaining term of the lease at a yearly rent, payable quarterly, the first payment for the half-quarter at the then next Christmas, B. agreeing to insure the lease and counterpart to be prepared at the expense of B., and to contain all the clauses, covenants, &c., which A. entered into in the lease to him—

The Court held, that the instrument amounted to a legal demise with a right to immediate possession, and not to a mere agreement for a lease.

WARMAN *v.* FAITHFUL, H. T. 1834. K. B. 3 *N. & M.* 137; S. C. 5 *B. & Ad.* 1042.

So, an instrument containing the terms of letting, viz. for seven, fourteen, or twenty-one years; the time of commencement, the amount of rent, when to be paid, and stipulations for repairs:—Held, to amount to a lease.

"MEMORANDUM of an agreement, &c. The said John Faithful agrees to let to William Warman for a term of seven, fourteen, or twenty-one years, to commence at Christmas, 1831, &c., at the yearly rent of 24*l.*, payable quarterly, &c.; it is also agreed, that William Warman is to paint the inside of the said messuages every seven years and the outside every five years, to keep the said messuages in all good and substantial reparation, &c. It is also further agreed, that whatever buildings or additions may at any time be erected on the premises by William Warman shall be left by him when he quits the same, and shall not on any account be removed; and, if the said William shall be desirous of putting an end to this agreement at either of the said terms before specified, he hereby binds himself to give to John Faithful six months' notice in writing of the same. Lastly, it is agreed that W. Warman is to pay all the expenses of preparing a lease for either of the terms above stated, &c."

The Court held, that the agreement must be taken to enure as a present demise, notwithstanding a provision by which it was stipulated that the tenant should pay all expenses of preparing a lease for either of the terms stated.

JOHN *v.* JENKINS, M. T. 1832. Ex. 1 *C. & M.* 227; S. C. 3 *Tyrw.* 170.

But, where a farm is to be let according to the valuation, but no contract signed, it is an agreement not a lease.

THE party having occupied under a former agreement, afterwards a new one was entered into, by which the landlord let the farm at a valuation by two persons to be chosen by each, the tenant to give sureties to answer the rent, and the valuation to determine the rent for that year and for the time to come.

The Court held the contract to amount only to an agreement and not to a lease; and no valuation having been made or sureties given, the tenant continued upon the original terms of holding.

ALDERMAN *v.* NEATE, E. T. 1839. Ex. 4 *M. & W.* 704.

An agreement for a lease, if none be executed, may operate as a demise.

UPON an agreement for a demise of premises for ninety-nine years to a committee in trust for the parishioners of H., for the purpose of a poor-house, with a clause for purchasing in fee, and agreements by the committee to pay the rent and keep in repair &c., and to execute a lease &c., but none was ever executed—

The Court held, that the agreement operated as a demise from the date thereof and not as a mere agreement for a lease, and that it vested in the overseers by force of the 59 Geo. 3, c. 13, s. 17, for the time being, and that they were liable to the covenants.

BAKER *v.* GOSTLING, T. T. 1834. C. P. 1 *Bing. N. S.* 19; S. C. 4 *M. & Scott,* 539.

THE lessee of a term underlet the premises for a term longer than his own, and the under-lessee covenanted with him to pay the rent.

The Court held, that it amounted to a demise and not an assignment; and that the covenant was for a payment in the nature of rent, and the executors of the original lessor entitled to sue on the privity of contract with their testator.

So, if the lessee of a term underlets for a longer term than his own, it is a demise and not an assignment.

III. RELATIVE TO THE STAMP ON LEASES, AND AGREEMENTS FOR A LEASE.

RAWSON *v.* EICKE, M. T. 1837. K. B. 2 *N. & P.* 423.

AN agreement to make and execute a lease, with stipulated terms and covenants, to be prepared at the costs of the lessee, and approved of by the lessor's solicitor. After the execution of such agreement, the intended lessor assigned the premises for a long term, became bankrupt, and the mortgagee gave the lessor notice to pay the rent to him.

The Court held, that the instrument was properly stamped as an agreement for a lease, and that, after such notice, he might maintain the action for use and occupation, for the occupation after the mortgage to him.

An agreement for a lease should be stamped as an agreement.

BICKNELL *v.* HOOD, M. T. 1839. Ex. 5 *M. & W.* 104.

BY the agreement for a demise of premises, to hold from a future day, at a rent payable quarterly, and to execute a lease, with the usual covenants for payment of rent, &c., it was stipulated, that, until such lease should be executed, the grantor might distrain for rent in arrear.

The Court held, that, as such stipulation would have been nugatory if the instrument were intended to operate as a demise, it amounted only to an agreement, and that a lease-stamp was unnecessary.

That which amounts to a parol agreement only need not be stamped as a lease;

STANIFORTH *v.* FOX, T. T. 1831. C. P. 7 *Bing.* 590; S. C. 5 *M. & P.* 589.

UPON a memorandum of agreement, whereby the defendant agreed to let to plaintiff certain premises for a term of years, and to build certain erections, at a rent of £——, to be paid half-yearly, the defendant to pay the ground-rent; and it also acknowledged the receipt of a payment, as earnest—

The Court held, that whether an instrument be a lease, or an agreement for a lease, must depend upon the whole of the instrument; the words, "agree to let," not being conclusive for an agree-

but an agreement to let for a term of years, and to build, &c., a certain sum to be paid, and reciting part payment as an earnest, is a lease, and

must be stamped as such*.

ment. Where there was no distinct reference to a future instrument, and the instrument itself contained all the terms, the Court construed it a lease; and, being so, it required a lease and not an agreement stamp.

DOE *d.* KETTLE *v.* LEWIS, E. T. 1830. K. B. 10 *B. & C.* 673.

The stamp need only be according to the rent reserved, and not on a fine formerly paid†;

THE lease was stamped according to the rent reserved, being the only consideration expressed, although a fine was also proved to have been paid.

The Court held, that such a conveyance, liable to ad valorem duty by the 55 Geo. 3, c. 184, (schedule, part 1, tit. "Conveyance") is not void, because the true consideration merely is not expressed on the face of the deed. The duty is payable merely on the sum expressed; though, under the 48 Geo. 3, c. 149, the parties may be liable to punishment for not truly *expressing* the consideration.

COSTER *v.* COWLING, T. T. 1831. C. P. 7 *Bing.* 456; S. C. 5 *M. & P.* 399.

unless there be a separate reservation of 50*l.* for the furniture and fixtures.

IN covenant on a lease, it appeared that the lease reserved a rent of 350*l.* on the land and house, and, by a separate reservation, 50*l.* for the furniture and fixtures.

The Court held, that a stamp of 3*l.* was insufficient.

BUCKWORTH *v.* SIMPSON, H. T. 1835. Ex. 1 *C., M. & R.* 834; S. C. 5 *Tyrw.* 344.

An instrument stamped as an agreement may be afterwards stamped as a lease, under 55 Geo. 3, c. 184.

THE original lessee in 1803 agreed with the lessors for premises for one year, and so from year to year, with power to determine on giving six months' notice, and with terms as to management and keeping in repair. The agreement bore a 15*s.* stamp, being at that time requisite, under the then Stamp Act, but a 1*l.* stamp imposed by 55 Geo. 3, c. 184, on such an instrument as a lease, had been recently affixed.

The Court held it to have been properly stamped.

STRUTT *v.* ROBINSON, E. T. 1832. K. B. 3 *B. & Ad.* 395.

A contract, being neither a schedule, inventory, nor catalogue, within 55 Geo. 3, c. 184, does not require a 25*s.* stamp.

UPON an agreement for a demise, the lands to be farmed according to the covenants in a lease granted to another, which had expired—

The Court held, that such lease being neither a schedule, inventory, or catalogue, within the 55 Geo. 3, c. 184, sch. 1, it did not require a 25*s.* stamp.

* Whether an agreement for a lease shall enure as a present demise, is a question of intention, to be collected from the instrument; therefore, where an agreement for a lease contained a stipulation as to the terms upon which the tenant should hold till a lease was granted, but also contained a proviso that it should not be construed or taken to operate as a second lease or actual demise:—Held, that it did not require a lease stamp. (*Perring* v. *Brook*, 1835, N. P., 7 C. & P. 360).

† A lease contained a demise of two separate farms, with habendums differing from each other, a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time:—Held, that one ad valorem stamp for the amount of both rents was sufficient. (*Blount* v. *Pearman*, 1 Scott, 55; S. C. 1 Bing. N. S. 408).

PEARCE *v.* CHESLYN, H. T. 1836. K. B. 4 *Ad. & E.* 225.

If a stamped agreement incorporates an unstamped one, the latter being stamped as a lease is sufficient.

BY a paper, intitled a memorandum of agreement, signed by plaintiff and defendant, it was recited that defendant and W. had agreed to abandon the annexed contract for taking and letting certain lands; that plaintiff and defendant agreed, the former to take, the latter to let the lands, upon the conditions contained in the annexed contract; "the said rent to be paid by quarterly payments, and to be in amount 220*l.* annually; and we further bind ourselves to the other to execute a similar agreement to the one recited and referred to." This agreement had a 3*l.* stamp; the annexed agreement had no stamp, and was, in effect, a lease from the defendant to W., setting out regularly the terms of the tenancy, &c.

The Court held, that the stamped agreement incorporated the unstamped one, and that the two together might be given in evidence as a lease, on the terms contained in the unstamped one.

IV. RELATIVE TO THE ENTRY.

MILLER *v.* GREEN, M. T. 1831. C. P. 8 *Bing.* 92; S. C. 6 *M. & P.* 199; S. C. *on error*, 2 *C. & J.* 142; S. C. 2 *Tyrw.* 1.

A lease conveys no estate, unless there be an entry.

IN replevin, it appeared that a party, having a life estate, granted, bargained, sold, and demised the same to A. for ninety-nine years, for securing an annuity; but no entry was alleged ever to have been made by the lessee, nor that the deed should enure by way of bargain and sale; and subsequently, the grantor executed a deed charging an annuity to B. on and out of the same premises, with power of distress, under which the grantee had seized, inter alia, standing crops.

The Court held, 1st, that the grant to A., considered as a lease, created no estate in him for want of an entry; and 2dly, that the estate continuing in the lessor, the subsequent grant and power of distress were capable of taking effect.

V. RELATIVE TO THE EXPENSES OF*.

VI. RELATIVE TO THE CONSTRUCTION OF.

STRICKLAND *v.* MAXWELL, T. T. 1834. Ex. 2 *C. & M.* 539; S. C. 4 *Tyrw.* 346.

In construing a lease, the inten-

UPON a lease habendum for one year, the words, "and so on from year to year &c.," having been struck out before the lease was ex-

* In a written agreement for a lease, it was stipulated, that, if the tenant shall be desirous to take a lease of the premises, he the said (landlord) will, at the request and cost of the said (tenant), grant and execute to him a lease thereof:—Held, that, upon this agreement, the tenant was not bound to pay for the counterpart of the lease, although the lease was to contain covenants to be performed by the tenant; and that, if the landlord required a counterpart, he must be at the expense of it himself. (*Jennings* v. *Turner*, E. T. 1837, N. P., 8 C. & P. 61).

tion of the parties will be taken into consideration, even as to the duration of the tenancy*.

ecuted, but being a printed form, the covenants usually applicable to a longer term remained—

The Court held, 1st, that it created only a tenancy from year to year, and that the Court might look at the instrument as it originally stood, and at the alterations made in it, to ascertain the intentions of the parties, and that the stipulations introduced in contemplation of the lease lasting longer than the year were to be considered as virtually at an end by the expunging those words which would have raised a longer tenancy; and, 2ndly, that the landlord being entitled to the possession at the expiration of the term, and the tenant only to the value of the off-going crop, that the locking-up of the gates in which the crops were was a trespass which the defendant, who had entered under an execution against the tenant, could not justify.

STEELE *v.* MART, T. T. 1835. K. B. 4 *B. & C.* 272; S. C. 6 *D. & R.* 392.

The day of delivery, and not the date, is the time when a lease takes effect from.

IN an action on a lease, there was evidence to shew that it was not executed until after the date it bore date—

The Court held, that it began to run from the quarter-day, preceding the date of the delivery, although the habendum expressed it to be from the feast day of, &c., "then last past." A lease takes effect from the day of the delivery, and not from the date; and it may be shewn to have been delivered on a different day.

STRICKLAND *v.* MAXWELL, H. T. 1834. Ex. 2 *C. & M.* 539; S. C. 4 *Tyrw.* 346.

The habendum cannot be affected or controlled by subsequent stipulations.

FROM the terms of the instrument (a blank printed form of lease, filled up, and an erasure in the habendum) it was clear that nothing more than a tenancy for one year was created.

The Court held, that subsequent stipulations as to the off-going crop, applicable to a tenancy for a longer term, could not affect or control the habendum, so as to give the tenant a right of possession after the expiration of the year; and that the Court might look at the original and the altered forms, to collect from the whole instrument the intention of the parties, being apparent from the face of it, and not matter dehors the document.

HOLDING *v.* PIGGOTT, M. T. 1831. C. P. 7 *Bing.* 465; S. C. 4 *M. & P.* 427.

A repugnant or inconsistent condition will be excluded.

THE stipulations in the lease, as to the mode of cultivation, applied only to the holding during the tenancy, but were wholly silent as to the terms of quitting.

The Court held, that an affirmative covenant, that the wheat lands should be summer fallowed, and an affirmative custom for the off-going tenant to have one proportion of the wheat for the away-going crop, if sown after a summer fallow, and another proportion if sown

* An instrument by which A. agrees to let and B. to take certain premises on the terms that A. shall pay certain rents, varying in amount at the end of every three years, up to a specified date, and which provides that from and after that date "he shall pay the clear annual rent of 9*l.* till the end of the lease, but does not mention any time at which the lease is to terminate," is good only for the time previous to the date at which the 9*l.* is to commence. (*Gwynne* v. *Mainestone*, H. T. 1828, N. P., 3 C. & P. 302).

after turnips, were not so inconsistent as that the tenant might not be entitled to his share of wheat growing at the determination of the tenancy, after a crop of turnips, the landlord having a right of action, if the covenant had not been observed. If any condition in the lease is necessarily repugnant to, or inconsistent with a custom, the latter is excluded.

EVANS *v.* VAUGHAN, T. T. 1825. K. B. 4 *B. & C.* 261; S. C. 6 *D. & R.* 349.

IN an action upon a covenant for quiet enjoyment, "during the said term," contained in a lease for three lives absolutely, which the lessor, a tenant for life, had not power to grant—

The word "term" may be construed to mean either the time or the estate granted.

The Court held, that the "term" contemplated by the parties was a term to continue during the three lives mentioned in the lease, and that the representative of the lessor having evicted the lessee while two of the cestui que vies were living, was guilty of a breach of the covenant. The word "term" may be taken to signify either the time or the estate granted.

HINCHLIFFE *v.* EARL OF KINNOUL, T. T. 1838. C. P. 6 *Scott*, 650; S. C. 5 *Bing. N. S.* 2.

VACANT land had been let on a building lease, which expired in 1824; and the plaintiff had become possessed of a house erected thereon from an under-lessee, and had enjoyed therewith a right of using a passage adjoining for shooting coals into his cellar, and laying water-pipes thereto; and the original lessor had, pending the lease, granted a reversionary lease of the plaintiff's house to him, with all and singular the appurtenances, to hold from the day &c. when the original lease would cease and determine.

The right of using a passage for shooting coals, &c., passes, though not named in a lease.

The Court held, that the right of passage, and of using it for such purposes, passed under the reversionary lease as a necessary incident to the subject-matter demised, although not specially named in it; and that, upon the expiration of the original lease, the lessor never having for a moment a right of possession, such easement was not extinguished by any unity of possession.

DOE *d.* PRITCHARD *v.* DODD, M. T. 1833. K. B. 2 *N. & M.* 838.

A LEASE was granted by the assignees of J. P., and the cestui que trust for life, and J. P. confirmed the premises unto A., his heirs and administrators, for and during the term of his natural life, with covenant by A. for himself, his executors, &c., to pay the rent, and on the determination of the lease by the death of J. P. peaceably to yield up; and on the part of the assignees and J. P. for quiet enjoyment during the life of J. P.

A covenant on the determination of the lease by the death of A. B. to yield up possession, &c., is a lease for life.

The Court held, that the lease must be taken to be a demise for the life of J. P., and that a covenant for quiet enjoyment amounted to a demise; so a license to enter and occupy.

LEGH *v.* HEALD, H. T. 1831. K. B. 1 *B. & Ad.* 622.

IN an action of trespass it appeared that there had been a demise of a tenement called Woodend, containing nineteen acres, "except all timber and other trees, wood, underwoods, sand, marl, pines,

Under the words, "except all timber and other trees,

wood, and underwoods:"—Held, that the soil on which trees, not timber, grew, was not excepted.

&c." The question was, whether the soil of a woodland close, part of Woodend, called Roach Key, was excepted by these words, "or only the wood growing thereon." If that close were not included in the demise only thirteen acres would pass.

The Court held, that the soil of Roach Key passed by the demise, and was not excepted.

BULLEN *v.* DENNING, T. T. 1826. K. B. 5 *B. & C.* 842; S. C. 8 *D. & R.* 657.

But, under the words, excepting "all timber and other trees, but not the annual fruit thereof," apple-trees are not within the exception.

TRESPASS for cutting down and carrying away trees. It appeared that a demise of a tenement for three lives contained an exception of "all timber and other trees, but not of the annual fruit thereof." There was a clause making the lease void if the tenant should cut "any maiden or ground pollard tree."

The Court held, that apple-trees were not excepted; and that the exception of trees bearing annual fruit might be satisfied by referring it to other than apple-trees, which were on the premises, such as oak, &c., acorns being considered as fruit.

DOE *d.* DYMOKE *v.* WITHERS, M. T. 1831. K. B. 2 *B. & Ad.* 896.

A covenant to expend a certain sum "in effectually repairing" does not amount to a covenant effectually to repair.

UNDER a power to demise premises devised for any term not exceeding sixty-one years, "for the purpose of new-building or effectually rebuilding and repairing any messuage, &c. now standing and being, or hereafter to stand and be," upon any of the premises, the devisee, in consideration of the great expense the lessee would be at in effectually repairing the premises, granted a lease for sixty-one years, with a covenant by the lessee to expend £— at the least in effectually repairing, and that he would at all times well and sufficiently repair, &c.

The Court held, that the lease was not answerable to the only object for which the party was authorized to grant it, upon the distinction between the effect of the terms "repairing" and "rebuilding and repairing;" and that the covenant to expend a certain sum at least in effectually repairing would not even amount to a covenant effectually to repair.

GREENSLADE *v.* TAPSCOTT, T. T. 1834. Ex. 1 *C., M. & R.* 55; S. C. 4 *Tyrw.* 566.

A stipulation for an increased rent, in case of underletting, applies for the purpose of a potato crop.

IN an action on a lease, it appeared that the lessee stipulated for an increased rent for every acre suffered to be occupied, without the landlord's consent, by any other person, and the tenant covenanted to occupy and cultivate according to the custom of the country.

The Court held, that underletting in small portions, for the purpose of a potato crop, was within the stipulation entitling the landlord to the increased rent, although proved to be usual amongst the farmers.

VII. RELATIVE TO ALTERATIONS IN.

HALL *v.* CHANDLESS, M. T. 1826. C. P. 4 *Bing.* 123; S. C. 12 *Moore*, 316.

An alteration made in a lease

A CASE, sent by the Vice-Chancellor, described an agreement for a building lease by A., the owner of lands, to be made to B. in

trust to secure, first, the ground rents to A., then the ground rents reserved to C. an underlessee, and afterwards in trust for D. and others, their executors and assigns, and to be assigned and delivered to them. A lease was accordingly prepared, and the description of the premises taken from a plan furnished by D. to the clerk of B., and executed by C. D.; after which, it appearing that a piece of ground had been improperly included in the description, the clerk, with the knowledge and by the direction of C. only, withdrew it from the lease, and which, so altered, was afterwards executed by A. and B., without any knowledge or privity of the alteration, nor was it noticed in the attestation. Upon a case sent by the Vice-Chancellor—

by an agent, without the consent of the lessor, if before executed, does not avoid the lease.

The Judges certified that the deed was valid, such alteration not having been made after the execution by the lessor and lessee.

VIII. RELATIVE TO THE ACTION FOR NOT ACCEPTING.

ROUTLEDGE *v.* GRANT, M. T. 1827. C. P. 4 *Bing.* 653; S. C. 1 *M. & P.* 717.

THE defendant sent the plaintiff a written proposal for the purchase of the lease of his house, requiring (amongst other things) that possession should be given "on the 28th of July," and a definitive answer within six weeks. The plaintiff, in answer, said that he accepted the proposal, and would give possession "on the 1st of August next." Before the expiration of the six weeks mentioned in the defendant's offer, he withdrew it, and the plaintiff then wrote to him again, stating that he was willing to give him possession according to the terms of his proposal.

To enable a plaintiff to recover for not accepting a lease, he must have assented to the offer*.

The Court held, that as the plaintiff had not accepted the defendant's offer in terms before the latter had retracted, the agreement was not completed, and the defendant was at liberty to renounce it.

IX. RELATIVE TO THE ASSIGNMENT† AND SALE OF‡.

STEWARD *v.* WOLVERIDGE, T. T. 1832. C. P. 9 *Bing.* 60; S. C. 2 *M. & Scott*, 75.

UPON an assignment of a lease, the lessor, by indorsement, assigned the premises, "subject to the payment of the yearly rent,

An assignment of a lease,

* A contract provided that a lease should be drawn, prepared, and executed at the sole expense of the lessor. In an action on the agreement by the lessee:—Held, that it was not necessary to aver that a lease was tendered to the lessor for execution. (*Price* v. *Williams*, H. T. 1836, Ex., 1 M. & W. 6).

† An assignee of a lease containing covenants running with the land is liable, after he has assigned over, for a breach incurred after the assignment to him, and before his assignment over. Assignees of all a debtor's property in trust, for the creditors, are not bound to accept a lease of which they were ignorant when they executed the assignment, and which they think likely to be injurious to the creditors. They may put up such a lease for sale, to try whether it can be made beneficial, without rendering themselves chargeable as assignees of the lease; but if they treat the estate as their own, and do any thing which is injurious to the owner, they are chargeable as assignees of the lease. (*Carter* v. *Warne*, H. T. 1830, N. P., 1 M. & M. 479).

‡ In an action by vendee against vendor of a lease for the deposit:—Held, that the vendor is not bound to produce his lessor's title, without an express stipulation to that effect. (*George* v. *Pritchard*, T. T. 1826, N. P., 1 Ry. & M. 417)

"subject to the payment of the rent and to the performance of the covenants contained in the indenture," binds the assignee.

and to the performance of the covenants contained in the indenture of lease."

The Court held, that those words imported an assent on the part of the defendant, that he would perform all the covenants contained in the indenture, and amounted to an express covenant to perform them during the continuance of the lease; and the lessor having been called upon to pay the rent, the assignee was liable first, although it accrued after he had assigned over.

BEALE *v.* SANDERS, T. T. 1837. C. P. 3 *Bing. N. S.* 850; S. C. 3 *Scott*, 58.

An assignee who enters under a void lease, but occupies to the end of the term, is liable for repairs.

THE defendant entered on premises under an assignment of a void lease, and continued to occupy and pay the rent until the term expired.

The Court held, 1st, that a lessee or assignee, holding under a void lease, which has been considered and treated to the expiration of the term as valid and binding, is liable in assumpsit for a breach of the covenants contained therein; but this liability does not extend beyond the term to a period when strangers have committed injury to the premises. Such a lessee is also liable for use and occupation until the end of the term, having himself received rent from his under-tenants until such time.

HARTSHORNE *v.* WATSON, T. T. 1839. C. P. 5 *Bing. N. S.* 477; S. C. 7 *Scott*, 494.

An assignment may amount only to an agreement to assign.

A. AGREED, in consideration and on payment of 200*l.* at stipulated times, to assign to B. the lease of certain premises for the residue of a term, of which A. was assignee, at the yearly rent of 100*l.* and under, and subject to the covenants, provisoes, and agreements in the original lease; and B. agreed to accept the said lease on payment of the 200*l.* and interest, and, in the meantime and until such assignment was made, to pay the rent and perform the covenants in the lease, and from the same to save harmless and indemnify A.; with a proviso, that, in case of default in payment of any or either of the instalments of the 200*l*, A. should be at liberty to re-enter.

The Court held, that this was not an absolute assignment, but only an agreement to assign on a given event.

BAKER *v.* GOSLING, E. T. 1834. C. P. 1 *Bing. N. S.* 246; S. C. 1 *Scott*, 58.

The assignment must be properly stamped.

IN support of an issue of assignment, the plaintiffs offered in evidence a deed executed by the defendant only, which, when executed, was intended by the parties to be the counterpart of a lease, and was stamped with a duty of 1*l.* 10*s.*; but the grantor having thereby parted with all his interest in the premises, the original deed became by operation of law an assignment.

The Court held, that the deed so tendered in evidence was not admissible for the purpose of proving an assignment, the proper stamp being 1*l.* 15*s.*, under the general clause to the 55 Geo. 3, c. 184, applicable to deeds of any kind not otherwise charged, or expressly exempted from stamp duty.

WHITTON *v.* PEACOCK, E. T. 1835. C. P. 2 *Bing. N. S.* 411; S. C. 2 *Scott*, 630.

IN 1762 a lessor, having only an equitable estate in a certain field, demised a portion of the field to a lessee for ninety-nine years. In 1773 the lessor, having acquired the legal estate in the field, demised the residue of the field to the lessee for the same term, by an indenture, which recited the former lease, stipulated for its continuing in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion.

The assignee of the reversion, as such, cannot sue the assignee of the lease.

The Court held, that the assignee of the reversion could not sue the assignee of the lessee upon the covenants in the lease of 1762.

X. RELATIVE TO THE CONFIRMATION OF.

DOE *d.* SOUTHOUSE *v.* JENKINS, T. T. 1828. C. P. 5 *Bing.* 469; S. C. 3 *M. & P.* 59.

THE father and uncle of the lessor of plaintiff being seised in tail, each granted a lease for ninety-nine years of one-third of the premises; and the jury found expressly that the lease had been confirmed by the lessor of the plaintiff.

A receipt of rent for ten years is such a confirmation of a lease, that the party cannot say he acted in ignorance.

The Court held, that the father's lease being only voidable by the issue in tail, and not void, he could not, after ten years receiving rent from the lessee, be supposed to have acted in ignorance of his right.

XI. RELATIVE TO THE RENEWAL OF.

STATHAM *v.* LIVERPOOL DOCK COMPANY, H. T. 1830. Ex. 3 *Y. & J.* 565.

A LESSEE, with right of further renewal, and under-covenants for the payment of periodical gross fines, assigned all his interest in part of his premises, subject to the payment of a proportionate part of such fines, to B.; afterwards, the interest of A., as also the reversion, became vested in C., after which one of the fines became payable, but was never demanded or paid.

A non-payment of a fine under a covenant is not such a breach as to deprive the lessee of a renewal.

The Court held, that the payment of such proportionate part, as between A. and B., resting only in covenant, the non-payment was not such a breach of the condition as deprived B. of his right to a renewed lease from C. The double character of C., as lessor and lessee, relieved the party claiming under A. from the strict performance of the obligation.

XII. RELATIVE TO THE TERMINATION OF.

(*a*) By whom and on whom binding.

Coombes *v.* Dutton, T. T. 1839. Ex. 5 *M. & W.* 468.

A notice to determine, signed by two out of three commissioners, sufficient.

A lease, to which the King was a party, was granted by the Commissioners of His Majesty's Woods and Forests, to be determined by notice "by the commissioners for the time being."

The Court held, that the lease was determined by a notice signed by two only out of three existing commissioners, by virtue of stat. 10 Geo. 4, c. 50, s. 92.

Rede *v.* Farr, E. T. 1817. K. B. 6 *M. & S.* 121.

A destruction of a lease may only bind the lessee.

In debt against a surety on bond, conditioned for the payment of rent by a third party (lessee) pursuant to the covenant in the lease, the covenant being with a proviso, that, if the rent should be unpaid for forty days after the stated days, although not demanded, the lease should be void—

The Court held, that such proviso did not vacate the lease entirely, although it did as against the lessee; and that the payment being to be made at the mansion-house of the lessor, no demand was necessary.

(*b*) By feoffment.

Doe *d.* Maddock *v.* Lynes, T. T. 1824. K. B. 3 *B. & C.* 388; S. C. 5 *D. & R.* 160.

A feoffment, without consent of third parties, cannot affect them so as to destroy the term.

An assignment of the residue of a long lease of certain premises from the lord of a manor, made in consequence of his intended marriage, and for the considerations mentioned in a certain indenture of three parts intended to bear date the day after the day of the date of the assignment, or indenture of assignment, of those premises, to two persons upon trust, that he should hold the premises during his life, and upon other trusts (as corresponding with limitations of real estate in tail) to which leasehold property may be subjected. On the next day he created an indenture by which, in consequence of his intended marriage, and of a considerable marriage portion which he would receive with his intended wife, he enfeoffed two other persons of the same premises, to uses, such as real estate is commonly conveyed to, by way of entail, and a memorandum of livery of seisin was indorsed upon it. The assignee continued in possession of the premises during his life; and an ejectment was afterwards brought by his heiresses for the freehold, against the representative of the survivor of the two persons to whom the premises had been assigned in trust.

The Court held, inasmuch as the trustees under the assignment did not know that there was to be a feoffment, and did not afterwards consent to it, that the feoffment had not destroyed the term for years as between these parties, whatever might be the advantage which the reversioner may take of it.

(*c*) By forfeiture.

Doe *d.* Ellerbrock *v.* Flynn, T. T. 1834. Ex. 1 *C., M. & R.* 137; S. C. 4 *Tyrw.* 619.

A lessee of a term gave up possession to a party who claimed an adverse title to his lessor— If the lessee of a term give up possession to a party claiming adverse title to his lessor, it is a forfeiture*.

The Court held, the delivering up of the lease and possession of premises by a tenant for years, in fraud of his landlord, to a party claiming adversely to the landlord, in order to enable such party to set up his hostile title, and not with the intention that he should hold under the lease, is a forfeiture of the term.

Doe *d.* Lloyd *v.* Powell, H. T. 1826. K. B. 5 *B. & C.* 308; S. C. 8 *D. & R.* 35.

This was an action of ejectment. The lease contained a clause of forfeiture in case the tenant should assign the lease, and the tenant did assign it to trustees for the benefit of his creditors; and upon this deed (treated as an act of bankruptcy) a commission issued against the tenant— But under a lease not to assign without license, an invalid assignment is no forfeiture;

The Court held, that this assignment turning out to be void was not sufficient to entitle the landlord to enforce it as a ground of forfeiture. A forfeiture cannot be enforced in respect of an act which of itself might work a forfeiture, but which, by a subsequent act, is rendered void.

Powell *v.* Lloyd, E. T. 1828. Ex. 2 *Y. & J.* 372.

The lessee under a covenant against alienation, after being long in possession, conveyed all his property to trustees for the benefit of his creditors, and subsequently became a bankrupt— as, where it amounts to an act of bankruptcy.

The Court held, that, such conveyance being an act of bankruptcy, and void, was invalid as an assignment of the lease, and therefore not a forfeiture.

Doe *d.* Griffith *v.* Pritchard, M. T. 1833. K. B. 2 *N. & M.* 489.—S. P. Doe *d.* Gatehouse *v.* Rees, H. T. 1838. C. P. 4 *Bing. N. S.* 384; S. C. 6 *Scott,* 161.

Lease for lives of E. G., H. E., and E. E., and the survivors and survivor of them, with a clause of re-entry, "in case the said E. G., his heirs or assigns, should become insolvent, and unable in circum- Where bankruptcy or insolvency is to be

* The mere wrongful payment of rent to a person not entitled does not operate as a disseisin of the landlord, or disclaimer of his title, so as to amount to a forfeiture of the lease. (*Doe* d. *Dillon* v. *Parker,* 1819, N. P., 1 Gow, 180). But where the defendant, in ejectment, alleged that the person through whom the lessor of the plaintiff claimed a title in fee, held only as tenant to the defendant:—Held, that such an assertion of title, operating as a disclaimer of the title of their landlord, amounted to a forfeiture of the lease or subsisting tenancy, and that notice to quit need not be proved. (*Doe* d. *Jefferies* v. *Whittick,* 1819, N. P., 1 Gow, 193). Where, by the terms of a lease of coal-mines, it was rendered absolutely void on a cessation of working for two years:—Held, that a subsequent receipt of rent would not set up the lease: the distinction is where the lease is rendered void, or only voidable, and a power of re-entry reserved on the doing or omitting to do a particular thing; in the former case no act of the lessor can renovate the lease, but in the latter the forfeiture may be waived by the lessor, with knowledge of it, receiving rent subsequently accruing due, or doing any other act acknowledging a subsisting tenancy. (*Doe* d. *Bryan* v. *Banks,* 1819, N. P., 1 Gow, 221).

a forfeiture, the lessee being convicted of felony, if a forfeiture, is waived by the receipt of rent.

stances to go on with the said farm," &c. H. E. became entitled to the premises as special occupant, and afterwards committed felony, was convicted, and attainted, but no office found; the reserved rent was afterwards paid by the mother of H. E. and his sister to the persons entitled to the reversion. On the death of the third life (E. E.), the reversioner let the premises to one C. E., and then brought ejectment and recovered possession; and against the defendants, tenants in possession under a subsequent letting by him, this ejectment was brought, on the ground that the lease was still subsisting, with freehold in H. E.

The Court held, that, admitting the conviction of H. E. to have created insolvency within the terms of the proviso, the acceptance of the reserved rent by the reversioner, even from those who had no title, was a waiver.

DOE *d.* TUCK R *v.* MORSE, T. T. 1830. K. B. 1 *B. & Ad.* 365.

Where certain duties were to be performed, in addition to the payment of rent, whether a performance by the lessee's tenants is a compliance, is a question for the jury.

IN ejectment it appeared that the defendant held under a lease from a tenant for life, containing, besides the money rent, certain duties to be performed by the tenant, inter alia, of carrying three loads of culm from the pits to the lessor's dwelling-house, yearly; shortly after the death of the tenant for life, at Michaelmas, the lessor of plaintiff, as the next remainder-man, desired his servant to go and look for carts to bring home culm, and he went to the defendant, and also to the other tenants, who accordingly carried a load to the house mentioned in the lease, and in the May following the defendant also sent two loads, which were received, as well as from other tenants.

The Court held, that whether the lease were valid or not, it was properly left to the jury to say, whether the culm was carted by the defendant, and received by the lessor of plaintiff after his title accrued in the way of rent under the reservation to that effect in the lease, and the Court refused to disturb their decision, that it was so carried and received.

RANDLE *v.* LEVY, E. T. 1837. K. B. 6 *Ad. & E.* 218.

Where a certificate is to be produced as to a party being alive, to shew a forfeiture, an affidavit will not do.

A LEASE for a term of years, if C. R. should so long live, contained a covenant that the lessee should, within three months after notice from the lessor, produce C. R., or otherwise make it appear to the lessor, within the time aforesaid, or within a reasonable time, if C. R. should be in foreign parts, by a good and sufficient certificate, that he was living. Proviso for re-entry on default. C. R. went to Brazil. The lessee being called in under the covenant, produced an affidavit, sworn in October, 1834, stating that the deponent had seen C. R. in Brazil, in 1832, and had often heard of him from that time till January, 1834, as residing at a place in Brazil, thirty miles from that in which the deponent lived during the same period; and that the deponent was convinced that C. R. was alive and well in January, 1834, when deponent left Brazil.

Held, that the facts subsequent to 1831 could not be properly certified by hearsay evidence, and that the statement of occurrences in 1831, from which C. R. might be presumed alive in 1834, was not equivalent to such certificate as the covenant required, that C. R. was then alive; and, therefore, that the affidavit was not a sufficient certificate, and a forfeiture was incurred.

(*d*) By merger. See tit. *Merger*.

(*e*) By surrender. See tit. *Surrender*.

XIII. RELATIVE TO UNDER-LEASES.

Neale *v.* Wyllie, M. T. 1824. K. B. 3 *B. & C.* 533; S. C. 5 *D. & R.* 442.

A lessee, who underlets, may recover against the assignee of the under-lessee, as damages, the costs of an action.

A lessee, under covenant to repair, underlet, with similar covenants, and the under-lease was assigned to defendant; and the premises being out of repair, the original lessor brought an action of covenant against his immediate lessee, and recovered damages.

The Court held, that the latter might recover, as part of his special damages, the costs of such action, and also of defending it, as, during the term, he could not enter to repair without rendering himself liable to be treated as a trespasser.

XIV. RELATIVE TO THE EFFECT OF CUSTOMS ON.

Roberts *v.* Barker, T. T. 1833. Ex. 1 *C. & M.* 808; S. C. 3 *Tyrw.* 945.

An express stipulation in a lease is paramount to a custom.

By the terms of a lease the tenant was bound to leave the manure in the fold, to be expended by the landlord for the succeeding tenant—

The Court held, the custom of the country is excluded when there is an express stipulation on a subject-matter to which it would otherwise apply, though such stipulation provides only for a part of the custom; as, where the custom is that the tenant shall leave the manure and be paid for it, and it is stipulated that he shall leave the manure, he is entitled to be paid the value of it.

XV. REMEDIES CONNECTED WITH.

(*a*) Declaration.

M'Allen *v.* Churchill, T. T. 1826. C. P. 11 *Moore*, 483.

A declaration on a lease need only state the covenant not performed.

In an action of assumpsit for breach of an agreement for the assignment of a lease, alleging that the defendant had no title to assign—

The Court held, that it was no variance in the declaration, not setting out a clause in the agreement, restraining the plaintiff from carrying on a certain trade in general terms, that not forming any part of the consideration; stating the covenant not performed, is sufficient.

(*b*) Inspection of*.

* Where a lease is in the hands of a tenant, and it appears that no counterpart can be found, the Court will permit the landlord to inspect and take a copy of the lease. (*Doe* d. —— v. *Slight*, H. T. 1832, B. C., 1 D. P. C. 163).

(*c*) Evidence.

Cowne *v.* Garment, E. T. 1834. C. P. 1 *Bing. N. S.* 318; S. C. 1 *Scott*, 275.

A memorandum on the margin of a lease ought to be received in evidence*;

By a memorandum on the margin of a lease of premises from Michaelmas, it was stated, that it is hereby understood that he is to be a tenant and pay rent from the preceding 12th of August.

The Court held, that, in an action for money alleged to have been paid upon a mistaken account, such memorandum ought to have been received in evidence and a new trial granted.

Doe *d.* Pearson *v.* Ries, M. T. 1831. C. P. 7 *Bing.* 725.

and, where a lease has been stolen, secondary evidence of its contents may be given.

In this case it appeared that the original lease had been stolen from the plaintiff by a party at the instigation of the defendant, who either had it or knew where it was, and there was no denial on the part of the defendant.

The Court made a rule absolute for giving evidence of its contents.

(*d*) Witnesses.

Fowler *v.* Round, M. T. 1839. Ex. 5 *M. & W.* 478.

To an action against A., plea, that the lease was assigned to A. and B.:—Held, that B. is a competent witness.

In an action of covenant for rent and non-repair, where the plea alleged that the premises came by assignment to the defendant's intestate and one S., who was still alive, which assignment was denied by the replication—

The Court held, that S. was a competent witness for the plaintiff to prove that he never accepted the assignment or acted under it.

Lease and Release. See tit. *Release*.

Leet, Court of.

See tits. *Corporation—Courts*.

Wilcock *v.* Windsor, M. T. 1831. K. B. 3 *B. & Ad.* 43.

A custom for the jury of a court-leet to enter, examine, and break deficient weights and measures, is good.

In trespass, it appeared there was a custom for the court-leet jury to enter and examine and break deficient weights and measures.

The Court held the custom good; and that, on a justification grounded on such a custom, it is sufficient to allege that the measures &c. were found by the jury to be false:—Held, also, that an adjournment from the 20th April to the 15th December for the jury to make their presentments was not necessarily so unreasonable as to make the custom of the court-leet unreasonable and bad.

* Enrolment of a lease under 1 & 2 Geo. 4, c. 52, s. 8, is not admissible as a public document without proof of the execution. (*Jenkins* v. *Biddulph*, M. T. 1825, N. P., 1 Ry. & M. 339).

Legacy*.

BARKER *v.* MAY, E. T. 1829. K. B. 9 *B. & C.* 489.

No suit lies in the ecclesiastical court for a legacy, payable out of equitable assets.

UPON a devise of lands to executors in trust to sell, the proceeds to be deemed part of the personal estate, and subject to the disposition thereof—

The Court held, that they were trustees thereof, and the proceeds equitable assets; no suit could therefore be maintained in the ecclesiastical court for a legacy payable out of those assets, and a prohibition granted.

HART *v.* MINORS, E. T. 1834. Ex. 2 *C. & M.* 700.

Where an executor pays some legatees, and enters on the account that he retains a sum for the plaintiff, money had and received will lie.

IN an action for money had and received, and on an account stated, it appeared that by will the executors were directed to divide the residue into six parts, to one of which the plaintiff was entitled, and the defendant, the executor, at a meeting of the residuary legatees exhibited an account charging himself with assets to a considerable amount, paid several their shares, and was about to pay the plaintiff when he was prevented by the plaintiff being called out and arrested; at a subsequent meeting the defendant produced another account, paid some other legatees, and wrote on the account that he retained a certain sum for the plaintiff.

The Court held, that the action was maintainable for money had, &c., and on an account stated.

BOWMAN *v.* WILLIS, E. T. 1837. C. P. 3 *Bing. N. S.* 669; S. C. 4 *Scott*, 387.

In an action against an executor for the value of a specific chattel, the residuary legatee is a competent witness.

IN an action against a legatee to recover the price of a chattel sold by him as part of the property specifically bequeathed—

The Court held, that the executor and residuary legatee is a competent witness within 3 & 4 Will. 4, c. 42, ss. 26, 27, to prove declarations by the testator that the chattel was not his property, but merely kept by him upon trial.

Legacy Duty.

EVANS, *In re*, E. T. 1835. Ex. 2 *C., M. & R.* 206.

There is nothing illegal in in a testator framing his will

THE will contained a discretionary power only, but no express direction to trustees to sell, nor any manifestation in the will of the intention of the testator that there should be a sale—

The Court held, that a sale under such power was not a sale

* Where an executor agrees with a legatee to allow him interest on his legacy if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead plenè administravit in bar to an action by the legatee. (*Wasney* v. *Earnshaw*, 4 Tyrw. 806).

so as to avoid the duty*.

within the 55 Geo. 3, c. 184, schedule, part 3, nor the proceeds liable to legacy duty. There is no fraud in a subject so shaping the disposition of his property as to avoid the duty.

CHOLMONDELEY, *In re*, M. T. 1832. Ex. 1 *C. & M.* 149; S. C. 3 *Tyrw.* 10.

Under the 55 Geo. 3, c. 184, and other statutes previously passed:—Held, that the duty was payable on a fund limited by settlement after previous life estates, and in default, to the next of kin.

BY a marriage settlement, 20,000*l.* was vested in trustees to pay the dividends to the wife's father for life, and after his death to the husband, with remainder to the wife for her life, with a power of appointment amongst children, and in default of issue as she should by will appoint, in case she died in her husband's lifetime, or in case she should survive him, by deed or will, and in default of her appointment, amongst her next of kin; and the wife, after appointing this sum by will, died in her husband's lifetime.

The Court held, upon the construction of the 55 Geo. 3, c. 184, (Stamp Act), in connection with antecedent acts made in pari materiâ, and defining what the Legislature meant by the term "legacies," extending it to any gift payable out of any personal estate of which the testator has a disposing power, where a fund was limited by settlement after previous life estates to the husband and wife, to the appointees of the latter, and in default of appointment amongst her next of kin, that the legacy duty was payable on the fund so appointed.

FOSTER *v.* LEY, M. T. 1835. C. P. 2 *Bing. N. S.* 269; S. C. 2 *Scott*, 438.

So, under a bequest to pay debts, the creditors are liable for the duty;

UPON a bequest in trust to pay off the debts of a deceased husband—

The Court held, that the creditors were liable to pay the duty upon their respective debts; and that the executors having in a suit paid the full amount under the directions of the Court of Chancery, its attention not having been called to the point, and the duty afterwards at the Stamp Office being paid by them, were entitled to recover the amount from the creditors.

PLATT *v.* ROUTH, T. T. 1840. Ex. 6 *M. & W.* 756; *overruling the* ATTORNEY-GENERAL *v.* STAFF, M. T. 1834. Ex. 2 *C. & M.* 124.

and the appointee under a power is liable to the legacy duty;

A TESTATOR directed the whole of his property, after sale of real estate, to be converted into money, and, after some legacies bequeathed, the general residue to his daughter and his executors, in trust to permit his daughter to receive the interest, &c. for her life, and, after her death (subject to certain payments then to be made) upon trust for such persons (other than named individuals) in such

* Where from the whole tenor and context of the will the trustees have a discretion to sell real estate and convert it into personalty, until such discretion exercised the legacy duty does not attach. (*Attorney-General* v. *Mangles*, T. T. 1839, Ex., 5 M. & W. 120). So, where the testator provided that charitable legacies should be paid immediately and before his debts, and that all his legacies should be paid within two years and free of duty:—Held, that the former legacies came within the general words; and that, as well as legacies given by a codicil, they were exempt from duty. (*Byne* v. *Currey*, E. T. 1834, Ex., 4 Tyrw. 478; S. C., 2 C. & M. 603).

parts and in such manner as his daughter, whether sole or coverte, should by will appoint; and in default of appointment, upon trust for the next of kin of D. R., with a certain condition of forfeiting all interest in case of her marrying J. W., or any of his relations, &c.; the daughter received the interest during her life, and by will in exercise of the power bequeathed a sum to the descendants of the said D. R., and the rest of her father's property to parties strangers in blood to her and her father. D. R. was a nephew of the first testator.

The Court held, that, upon the construction of 36 Geo. 3, c. 52, s. 7, the property subject to the power was personal estate; and, upon sect. 18, that the power was to be deemed a general and absolute power, and the appointees taking as volunteers, and that no probate duty was payable in respect of the residuary estate of the father; that a duty of one per cent. was payable in respect of the bequest by the father to the daughter; and that legacy duty was payable in respect of the bequests in the daughter's will, at the same rate as would have been payable if they had been legacies given by her and payable out of her personal estate.

ATTORNEY-GENERAL *v.* PICKARD, M. T. 1837. Ex. 3 *M. & W.* 552; *affirmed in error*, H. T. 1840. 6 *M. & W.* 348.

LANDS were devised successively in tail, with power to each tenant for life in succession to charge the estates, by deed or will, with certain annuities by way of jointure, one of whom by will charged them with an annuity by way of jointure to his wife.

and that view has been affirmed by a court of error.

The Court held, that the appointee took by the gift of the original devisor, and the gift chargeable with the legacy duty:—Held, also, that the party entitled to the real estate in remainder was chargeable with such duty.

ATTORNEY-GENERAL *v.* HANCOCK, H.T. 1837. Ex. 2 *M. & W.* 563.

PREVIOUS to 36 Geo. 3, c. 52, a testator devised his residuary estate to the same uses as his real estate, before devised, viz. to G. for life, remainder to his issue in tail, in strict settlement; remainder over to M. for life, and like uses. Such residue remained invested in mortgage, and afterwards, and after the 5th of April, 1805, when the 55 Geo. 3, c. 184, came into operation, the remainder to M. took effect.

The legacy duty attaches on a devise which takes effect after the 55 Geo. 3, came into operation.

The Court held, that, being still personal estate when it devolved upon M., it was liable to the payment of legacy duty under the latter act.

ATTORNEY-GENERAL *v.* JACKSON, M. T. 1831. Ex. 2 *C. & J.* 101; S. C. 1 *Tyrw.* 50.

TESTATOR gave the residue of his freehold and copyhold messuages, lands, and tenements (not being rent-charges for life or lives) to R. J. and W. J., to the use of C. T., the wife of J. T., for life; and from and after her decease, "to the use and intent that J. T. should during his life receive, by and out of the said hereditaments, and the rents thereof, one annuity or clear yearly rent-charge of 500*l.*, clear of taxes, and without any deduction or abate-

Upon a gift "by way of annuity, out of or charged upon real estate," the legacy duty attaches;

ment whatsoever, to be payable quarterly, &c., with such powers and remedies of distress, and entry, and perception of rents, in case the said annuity of 500*l.* should be in arrear, as are reserved to lessors for the recovery of rents on leases for years;" and subject to the said annuity or yearly rent-charge to certain other uses, and, on failure thereof, as to one moiety, to the use of R. J., his heirs and assigns for ever; and as to the other moiety, to W. J., and his assigns for life.

The Court held, that the interest or benefit passing to J. T. was subject to the legacy duty, being " a gift, by way of annuity, out of or charged upon the testator's real estate," within the stat. 55 Geo. 3, c. 184, sch., part 32.

STOW *v.* DAVENPORT, M. T. 1833. K. B. 2 *N. & M.* 805; S. C. 5 *B. & Ad.* 359.

but an annuity, free from all deductions, is not liable to the legacy duty.

DEVISE of lands to trustees, to the uses, amongst others, that his wife should take from and out of the same premises such an annuity, not exceeding £——, as J. F. should by will appoint to be paid her, clear of all taxes and deductions whatsoever, with remainder to S. for life, charged with the annuity.

The Court held, that the annuitant was not liable to be charged with the legacy duty; and that S. having paid it, could not recover it from her.

ATTORNEY-GENERAL *v.* DUNN, Ex. 1840. Ex. 6 *M. & W.* 511.

The test as to the legacy duty is the natural domicile;

THE deceased had, in 1828, purchased a mansion and domain in a foreign state, where he made considerable alterations and repairs, and resided there occasionally, visiting the neighbouring states, and returning to this country, where he made his will, and shortly afterwards returned to his new residence.

The Court held, that, the circumstances shewing only an intention to fix his domicile there, his natural domicile remained, and the legacy duty was payable; and, semble, it would have been so if he had fixed it abroad.

EWIN, *In re*, M. T. 1830. Ex. 1 *C. & J.* 151; S. C. 1 *Tyrw.* 91.

and it therefore attaches on foreign stock where the testator is domiciled in England.

A TESTATOR, a British subject, and whose domicile was in this country, died possessed of stock in the American, French, and Russian funds; the executor possessed himself of such stock abroad, and was proceeding to transfer the same to the residuary legatee in those countries.

The Court held, that the property must be considered as English personal property, and consequently liable to the payment of legacy duty.

ATTORNEY-GENERAL *v.* DIMOND, H. T. 1831. Ex. 1 *C. & J.* 356; S. C. 1 *Tyrw.* 243.

Semble, contra.

THE testator died in England possessed of stock in the French funds—

The Court held, 1st, that, being assets not at the time of the testator's death within the jurisdiction of the Judge by whom probate is granted, the probate duty thereon under 53 Geo. 3, c. 184, did not attach; and 2ndly, that probate duty is not payable upon such

part of the assets of an English testator dying in this country as consists of property in a foreign country at his decease, although it be afterwards brought into and administered in this country by the executors; it not being the administration of the assets, but the local situation of those assets at the death of the testator, which renders the probate duty payable.

JACKSON *v.* FORBES, E. T. 1832. Ex. 2 *Tyrw.* 354.

So, a testator, born in Scotland, who dies in India, having no personal estate in England, bequeath legacies to legatees in England, and the money is afterwards invested in England, still the legacy duty is not payable.

A TESTATOR, born in Scotland, after several years' residence in India, died there, leaving real and personal estate, but no assets in England, he having devised the whole of his property, after some small legacies and annuities, equally between his four natural children, and their survivors and their heirs; the executors converted the estate into money, and remitted it to their bankers in this country, and afterwards invested it in the funds in their own names; and, upon a suit to determine the interests of the residuary legatees and their representatives after the death of the father, all deceased, the money had been invested in the name of the accountant-general, upon which a decree was afterwards made as to the shares of the several claimants. Upon a case sent to the Court of Exchequer—

The Court held, that neither probate nor legacy duty was payable in respect of the sums so bequeathed.

BRUCE, *In re,* E. T. 1832. Ex. 2 *C. & J.* 436; S. C. 2 *Tyrw.* 475.

And a testator, a Scotchman, domiciled in America, who leaves legacies to, and appoints an English executor, does not render them liable to the duty.

A TESTATOR, born of Scotch parents in America, before the separation of that country, but who had afterwards always described himself as an American; and, after passing a great part of his life in India, had retired to and died in America, where he was collecting his property, appointed an English executor, and gave considerable legacies to English subjects, having at the time of his death large funds in this country.

The Court held, that he was to be deemed an American, and entitled to transmit the personal property he had here free from every British burden, and that the legacies given to English subjects were not subject to legacy duty.

WILKINSON, *In re,* T. T. 1834. Ex. 1 *C., M. & R.* 142; S. C. 4 *Tyrw.* 513.—S. P. ATTORNEY-GENERAL *v.* NASH, E. T. 1836, 1 *M. & W.* 237.

A direction for executors to lay out the residue and divide the interest amongst certain poor:—Held, not to render the executors liable as beneficial legatees.

THE testator directed his executors to lay out the residue and divide the interest amongst certain classes of poor, in sums of 10*l.* or 15*l.*, as they should think fit.

The Court held, that the executors were not liable to the legacy duty as beneficial legatees, and that the individuals and not the class were the persons benefited, and who when selected by the executors would become liable when the sum exceeded 20*l.*, according to their propinquity to the testator, and then only would the executors be bound to retain and account for the duty.

ROBINSON, *In re,* E. T. 1837. Ex. 5 *D. P. C.* 609; S. C. 2 *M. & W.* 407.

An executor, who does not

IN this case a rule had been granted under the 2nd section of the 42 Geo. 2, c. 99, calling upon the administratrix of Moses Robin-

shew cause against a rule for not paying over the legacy duty, is liable for costs.

son, deceased, to shew cause why she should not deliver to the Commissioners of Stamps an account, upon oath, of all the legacies, or of the personal property paid, or to be paid, or administered by her. It was also part of the rule, that the administratrix should pay the costs of the Crown on this matter.

Lord *Abinger*, C. B.—This was a rule moved for by the attorney-general, with reference to the legacy duty. He desired that the rule might be made absolute, and, for the purpose of saving the expense of a further application to the Court, that an addition should be made to the rule for the Crown to be entitled to costs, in case it should appear upon the statement made by the administratrix, that there were legacy duties due from her which ought to have been paid. We think there is no objection to granting the rule in that form. It will save the expense of any further application, and therefore let the rule be made absolute, that the party shall pay such costs as shall be taxed by the Master, in case it shall appear, when the account is rendered, that legacy duties were due from her which she refused to pay.

PIGOTT, *In re*, T. T. 1833. Ex. 1 *C. & M.* 827; S. C. 3 *Tyrw.* 859.

But after a lapse of twenty years the Court will not compel the executor of an executor to account for duties, unless assests be shewn.

THE original testator had been dead upwards of twenty years—

The Court refused to compel the surviving executor of his executrix to account, he never having acted except in signing documents, and knowing nothing of the estate of his testatrix, and not having received assets of hers, or of the original testator. The power of the Court under 42 Geo. 3, c. 99, s. 2, is discretionary, and it seems will not be exercised where an unreasonable time has elapsed without any application to account, unless the delay is explained.

VIVIAN, *In re*, E. T. 1831. Ex. 1 *C. & J.* 409.

On an attachment for not accounting, the motion is nisi until a certain day.

ON motion for an attachment to be absolute in the first instance against the executors of this estate, for not accounting to the Legacy Office—

The Court granted a rule nisi, to be absolute by a day certain, unless cause was shewn on or before that day.

Lebari Facias. See tit. *Execution.*

Libel.

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I. RELATIVE TO WHAT AMOUNTS TO A LIBEL*.

(*a*) By advertisement.

Robertson *v.* M'Dougall, E. T. 1828. C. P. 4 *Bing.* 670; S. C. 1 *M. & P.* 692; S. C. 3 *C. & P.* 259.

A.'s bond was advertised by B. for sale; A. circulated a letter that B. had done so with the view to extort money from an unwary purchaser, or to extort money from A.:—Held, a libel†.

In an action for a libel, it appeared that the defendant, being sued by the plaintiff on a bond executed by him, as surety for one Morrison, conditioned for the due performance by Morrison of an award about to be made between him and the plaintiff, the defendant resisted payment, and commenced proceedings in equity, and also in Scotland, to set aside the bond, which the plaintiff (pending these proceedings) advertised for sale by public auction, as a common money bond. The defendant attended at the Auction Mart on the day of sale, and *there read* and circulated a letter that he had previously sent to the auctioneer, in which he stated that the plaintiff's object in offering the bond for sale was, "either to extract

* Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but, if the paper go beyond that, and be calculated to excite tumult, it is a a libel. (*Reg.* v. *Collins*, 1840, N. P., 9 C. & P. 456).

† A libel, contained in an advertisement by two tradesmen in partnership, stating that they deemed it necessary to caution their friends against a fraudulent representation that any part of their business had been removed, it being obvious that their concern was still carried on solely at No. 9, Mansion House-street, and that they had no connexion with a shop recently opened in another place, under circumstances grossly misrepresented and highly discreditable, with a view of defrauding them of a part of their business, is not justified by proof that the person alluded to (who had been for several years in partnership with them)

money from the pocket of an unwary purchaser, or, what was more likely, by means of the threat of publication, to extort money from him (the defendant)."

The Court held, that this was a libel, and that proof of express malice was not necessary.

STOCKLEY *v.* CLEMENT, E. T. 1827. C. P. 4 *Bing.* 162; S. C. 12 *Moore*, 376.

But an advertisement, that a bill, drawn by the plaintiff, contained a forged acceptance, or was obtained by fraud, does not amount to a libel on the plaintiff.

IN an action against the proprietor of a newspaper for a libel, the declaration set out the libel. "To bill-brokers and others. Caution. Reward. Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date, London, May 26th, 1825, and purporting to be drawn by one J. S. upon, and to be accepted by, the Dowager Lady P. T., for 8000*l.* with interest, payable twelve months after date to the order of the said J. S.; I do hereby give notice on behalf of the said Dowager Lady P. T., that she has not accepted such bill, and that, if her name should appear in any instrument, the same has been forged, or her handwriting to the said acceptance of the said bill, if genuine, has been obtained by fraud, in total ignorance on her part of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument shall be handsomely rewarded. Thomas Bains." The jury having found for the defendant—

The Court refused to set aside the verdict.

LAY *v.* LAWSON, M. T. 1836. K. B. 4 *Ad. & E.* 795.

So, an advertisement, offering a reward for such information as to enable a debtor to be discovered, is not a libel.

IN an action for a libel, it appeared that the libel was contained in an advertisement, stating the issuing of process against the plaintiff, and that he could not be found, and offering a reward for such information as should enable him to be taken; plea, that a capias had been issued and delivered to the sheriff, that the plaintiff kept out of the way, and that the advertisement had been inserted at the request of the party suing out the writ to enable the sheriff to arrest—

The Court held the defence good.

(*b*) BY COMMENTARY OR CRITICISM*.

DUNNE *v.* ANDERSON, E. T. 1825. C. P. 3 *Bing.* 88.

A fair comment is not a libel.

THE plaintiff, a surgeon, had presented a petition to Parliament against empirics and irregular practitioners, and defendant, in a me-

had issued a bill, in which, after thanking his friends for their favours during his residence at No. 9, opposite the Mansion House, he stated that he had removed his establishment to another place, where the business would be carried on under the firm of R. R. & Co., and, in addition to this, had put over his shop-door, "R. R. & Co., removed from opposite the Mansion House." If the publication of a libel consists in merely selling a few copies of a periodical, in which, inter alia, it is contained, one question for the jury is, did the parties know what it was they were selling? (*Chubb* v. *Flannagan*, T. T. 1834, N. P., 6 C. & P. 431).

* Fair criticism on works of a professional artist cannot be the subject of an action, however mistaken in point of taste; but it is for the jury to say if it be unfair and intemperate, and intended to injure the artist in his profession, by imputing to him that he acts on absurd principles of art. (*Soane* v. *Knight*, E. T.

dical journal, had commented on the petition, reflecting on the plaintiff for ignorance, and particularly in chemical knowledge; and the Judge had directed the jury, that if they considered the libel a fair comment on the petition, and not a malicious effusion against the plaintiff, and also that if they considered that it imputed to him ignorance in chemistry only, and not in his profession as a surgeon, to find for the defendant, which they did.

The Court granted a new trial, as it seems that a party presenting a petition to Parliament does not place himself in the situation of a publisher.

GREEN *v.* CHAPMAN, M. T. 1837. C. P. 4 *Bing. N. S.* 92; S. C. 3 *Scott*, 340.

But the words of a floricultural exhibitor, that his name is to be found "in dirty works," is a libel.

THIS was an action for a libel, for writing of the defendant, a floricultural exhibitor, "the name of G. is to be rendered famous in all sorts of dirty works"—

The Court held the libel not within the privilege of fair criticism.

(*c*) BY HAND-BILL OR NOTICE*.

(*d*) BY MISDESCRIPTION†.

(*e*) BY RIDICULE.

COOK *v.* WARD, H. T. 1830. C. P. 6 *Bing.* 409; S. C. 4 *M. & P.* 99.

Although a party may relate a ludicrous story of himself, and tell another to publish it, it is a libel‡.

IN an action for a libel—

The Court held, an action will lie for the publication in a newspaper of a story calculated to render a party ridiculous, although the plaintiff has himself first spoken of it.

1827, N. P., 1 M. & M. 74). Publishing of a painting publicly exhibited that it was a mere daub, with other strong terms of censure:—Held, that it was a question for the jury, whether a fair and temperate criticism, or only the vehicle of personal malignity towards the plaintiff. (*Thompson* v. *Shackell*, E. T. 1828, N. P., 1 M. & M. 187).

* In an action on a libel for publishing a hand-bill, offering a reward for the recovery of certain bills of exchange, and stating that A. B. is suspected of having embezzled them, it is a good defence on the general issue, that the hand-bill was published solely with a view to the protection of persons liable on the the bills, or to the conviction of the offender. Evidence is admissible in such a case, that the party publishing the hand-bill followed it up, by preferring a charge of the same nature against A. B. before a magistrate. (*Finder* v. *Westlake*, M. T. 1829, N. P., 1 M. & M. 461). The following publication was held to be a libel:—"Notice, any person giving information where any property may be found belonging to H. G., a prisoner in the King's Bench prison, but residing within the rules thereof, and 3, 4, and 5, Portland-place, Borough-road, shall receive 5 per cent. upon the goods recovered for their trouble by applying to A. B.," &c. (*Gompertz* v. *Levy*, M. T. 1838, Q. B., 1 P. & D. 214).

† If the surveyor to a society, which publishes an account of the different classes of ships for the information of merchants, underwriters, &c., is requested by a shipowner to survey his ship, and does so in consequence, and makes a report to the society, who classes the vessel according to his report, such shipowner cannot maintain an action against the members of the society for a libel in misdescribing the ship, nor against the surveyor, unless he made a false report; and query, whether such an action is maintainable at all, without evidence of express malice? (*Kerr* v. *Shedden*, H. T. 1831, N. P., 4 C. & P. 528).

‡ Where one newspaper copied a libellous paragraph from another, adding the word "fudge" at the close:—Held, in an action by the party libelled, against the

(*f*) Of privileged or confidential communications.

Pattison *v.* **Jones**, M. T. 1828. K. B. 8 *B. & C.* 578; S. C. 3 *C. & P.* 383.

A privileged communication must be bonâ fide*.

The plaintiff's master (the defendant) had, on his quitting his service, and being about to enter on another, written of his own accord a letter informing the party that he had been discharged for misconduct, and on receiving a letter inquiring the particulars had written the libellous letters for which the action was brought.

The Court held, that, although a party might set himself in motion to induce inquiries by a third party, and the answers although slanderous might come within the scope of privileged communications, yet in such a case it will be a question for the jury to say if the defendant acted bonâ fide or maliciously, intending to do the plaintiff an injury.

publisher of the paper in which the word "fudge" was added, that it was for the jury to say whether the object was to ridicule the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken. (*Hunt* v. *Algar*, M. T. 1833, N. P., 6 C. & P. 245).

* Charges made by a rate-payer against the constable of a district to a meeting of rate-payers, met to investigate the constable's disposal of the money of the inhabitants, are privileged, and may be made by letter if the rate-payer be prevented from attending; the party alleging such letter to be libellous must prove the absence of the rate-payer to have been wilful. (*Spencer* v. *Amerton*, 1835, N. P., 1 M. & Rob. 470). If B., a tradesman, be discharged from serving A., one of his customers, A. stating as the reason of it that B. charged for goods never delivered, and B. after this write a letter to A., vindicating himself, and imputing the dishonesty to a servant of A., this is a privileged communication if it be bonâ fide and without malice. (*Coward* v. *Wellington*, 1836, N. P., 7 C. & P. 531). So, if A. is going to have dealings with B., and he make inquiries of C., who gives A. information respecting B., this *is* a privileged communication; as every one is quite free to state his opinion bonâ fide of the respectability of a party thus inquired about. (*Storey* v. *Challands*, M. T. 1837, N. P., 8 C. & P. 234). So, where a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote to her a letter containing imputations on the plaintiff's character, and desiring a diligent and extensive inquiry into the plaintiff's character:—Held, that this was a letter written on a justifiable occasion; and that the defendant was justified in writing the letter, provided the jury be satisfied that in writing it the defendant acted bonâ fide, although the imputations contained in the letter were false, or based upon the most erroneous information; and that, if the defendant used expressions however harsh, hasty, or untrue, yet bonâ fide, and believing them to be true, he was justified in so doing. Communications of this kind should be viewed liberally by juries; unless they see clearly that there was a malicious intention of defaming the plaintiff they ought to find for the defendant. (*Todd* v. *Hawkins*, 1837, N. P., 8 C. & P. 88). But, where A. offered himself as a candidate to represent a place in Parliament, B., a voter for that place, published in a newspaper statements of A., reflecting on his character:—Held, that the fact, that A. was a candidate and B. a voter, did not bring this case within the rules respecting privileged communications. (*Duncombe* v. *Daniell*, M. T. 1837, N. P., 8 C. & P. 222). So, if A. has sold goods to B., a tradesman, and before the delivery of them, C., without being asked or solicited in any way to do so, speak words injurious to the credit of B. as a tradesman, this is not a privileged communication; but, if he *had* been asked by A. as to the credit of B., it would have been so. (*King* v. *Watts*, 1838, N. P., 8 C. & P. 614). Communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendants of the establishment, are not privileged. (*Martin* v. *Strong*, H. T. 1837, K. B., 1 N. & P. 291; S. C. 5 Ad. & E. 535).

BROOKS *v.* BLANSHARD, T. T. 1833. Ex. 1 *C. & M.* 779; S. C. 3 *Tyrw.* 844.

It is not because a letter is written confidentially that it is a privileged communication.

THE plaintiff, who had filled the situation of engineer in superintending the works of a railway company, of which the defendant and one L. were commissioners, became a candidate for the appointment of engineer to another undertaking, in which L. was also a commissioner. The defendant, who did not know L. was a commissioner, wrote to him recommending one B. as a candidate, in reply to which he received a letter stating that another person had been elected; he then wrote another letter to L. upon the subject of the railway, containing libellous matter in respect of the plaintiff's conduct when in the situation of engineer to the company, and in consequence of that letter being shewn the plaintiff was unsuccessful at a subsequent election.

The Court held, that the letter so written after the first and before the second election was not a privileged communication, though the letter might have been written confidentially.

(*g*) IN MATTERS CONNECTED WITH JUDICIAL PROCEEDINGS.

HAIRE *v.* WILSON, T. T. 1829. K. B. 9 *B. & C.* 643.

It is a libel to state in a report of the Insolvent Court that the landlord colluded with the tenant, the insolvent, to put in a fictitious distress*.

THE libel complained of purported to be the report of a proceeding in the Insolvent Court, and imputed to the insolvent's landlord (the plaintiff) that he colluded with the insolvent in putting in a fictitious distress.

The Court held, that the Judge ought not to have left it as a question to the jury whether the defendant intended to injure the plaintiff; but, that if he thought the tendency of the publication injurious to the plaintiff, to have told them it was actionable and the plaintiff entitled to a verdict. The law presumes the party to have intended to produce the injury which the libel was calculated to effect.

ROBERTS *v.* BROWN, T. T. 1834. C. P. 10 *Bing.* 519; S. C. 4 *M. & Scott*, 407.

It seems, the expressions of counsel, if all be published, are legal;

THE libel complained of purported to be an account of proceedings under a commission of lunacy, on which the plaintiff was examined as a witness, but stated only the result of the testimony and the opinion of the writer thereon; a plea, justifying part only of the libel, characterizing the counsel's speech as one of cutting severity

* A letter, written by an opposing creditor to the chief commissioner of such court previous to the hearing of an insolvent's case, is not a privileged communication. (*Gould* v. *Hulme*, E. T. 1829, N. P., 3 C. & P. 625). If a party who has summoned another before a magistrate draws up a report of what took place on the investigation, it is his duty to give an impartial statement, without any colouring or exaggeration, putting in all that is in favour of the party accused as well as that which is against him; and in such an account he has no right to insert an observation to the prejudice of the party made by the magistrate's clerk; and, if he do insert such observation, he is liable on that ground alone to an action for libel, as in such a case it is what the Judge says that is to be looked at, and not what any other person said who was present at the time. (*Delegall* v. *Highley*, M. T. 1837, N. P., 8 C. & P. 444; S. C. 3 Bing. N. S. 950).

against the plaintiff, and which, taken in connection with other parts, insinuated that the plaintiff was a perjured witness. On demurrer—

The Court held the plea bad; semble, if the whole speech had been set out it would not have been a defence; a party has not always the right to publish expressions which a counsel from his peculiar situation may be justified in using.

But see Flint v. Pike, post, p. 528.

SAUNDERS *v.* MILLS, M. T. 1829. C. P. 6 *Bing.* 213; S. C. 3 *M. & P.* 520.

THIS was an action for a libel. The libel professing to be a report of proceedings in a court of justice did not profess to state facts as deposed to by witnesses, but only as stated by the counsel for the prosecution.

at all events if deposed to by witnesses.

The Court held, that it could not be justified as a privilged publication; and that the Judge properly rejected evidence of publications by others to the same effect.

MALACHY *v.* SOPER, T. T. 1836. C. P. 3 *Bing. N. S.* 371; S. C. 3 *Scott*, 723.

PLAINTIFF was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in Chancery, to which plaintiff had demurred.

On demurrer to a bill in Chancery, to publish falsely that the bill had been overruled is not a libel without special damage.

The Court held, 1st, that, without alleging special damage, plaintiff could not sue the defendant for falsely publishing that the demurrer had been overruled; that the prayer of the petition for the appointment of a receiver had been granted; and that persons duly authorized had arrived at the mine; and 2ndly, that an allegation—that the plaintiff was injured in his right; that the shares were lessened in value; that divers persons believed that he had no right to the shares; that the mine could not be worked; and that he had been prevented from disposing of his said shares and from working the mine in so ample a manner as he otherwise would have done, and was prevented from gaining divers profits which would otherwise have accrued to him,—was not a sufficient special damage.

CHALMERS *v.* PAYNE, E. T. 1835. Ex. 2 *C., M. & R.* 156.

THIS was an action for a libel. The libel was an account, in the defendant's newspaper, of the trial of an action brought by the plaintiff against the proprietor of another newspaper, stating also that he obtained a verdict and damages. The general issue only was pleaded, and there was no other evidence than the newspaper containing the report.

Where the libel complained of is the report of a trial, it is for the jury to say whether the publication was injurious and malicious.

The Court held, that the learned Judge properly left it to the jury to say, upon the whole, whether the publication was injurious to the character of the plaintiff, and the statement tended to shew that it had been published with a malicious motive; and the jury having found a verdict for the defendant, the Court refused a new trial.

(*h*) Construction of*.

II. RELATIVE TO THE HOUSE OF COMMONS†.

Stockdale *v.* Hansard, T. T. 1839. Q. B. 9 *Ad. & E.* 1; S. C. 2 *P. & D.* 1.

Whether proceedings in the House of Commons be a libel, a court of law will determine.

In an action for the publication of a libel, the defendants pleaded that the Commons House of Parliament had resolved that the parliamentary papers and reports printed for the use of the House should be rendered accessible to the public by purchase; that the paper containing the supposed libel was part of the proceedings of the House, and was published by the defendants by the authority, and in pursuance of the orders and resolutions of the House; and that the House resolved, declared, and adjudged, that the power of publishing such of its reports, votes, and proceedings, as it should deem necessary or conducive to the public benefit, was an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament, as the representative portion of it.

The Court held, 1st, that, upon the question of privilege thus raised, the Court of Queen's Bench had jurisdiction to decide; 2ndly, that the plea was bad.

III. RELATIVE TO LIBELS ON PARTICULAR INDIVIDUALS.

(*a*) As to attornies.

Boydell *v.* Jones, H. T. 1839. Ex. 7 *D. P. C.* 210; S. C. 4 *M. & W.* 446.

The words, "honest lawyer," may be libellous‡.

Declaration for a libel, headed, "An honest lawyer," and alleging that the plaintiff had been reprimanded by one of the Masters of the Court for sharp practice, with introductory aver-

* In the following publication in a newspaper, "We again assert, against A. S. and A. H., (the plaintiffs), the facts formerly put by us upon record to be such as no gentleman or honest man would resort to." The words, "assert against," &c., may either mean, "in accusation of A. S. and A. H.," or, "in contradiction to the assertion of A. S. and A. H.," the former of which amounts to a libellous imputation, the latter not. (*Hughes* v. *Rees*, E. T. 1839, Ex., 4 M. & W. 204).

† The House of Commons, in the years 1835 and 1836, made resolutions that parliamentary papers and reports, printed for the use of the House, should be publicly sold by their printer; and afterwards, a report from the inspectors of prisons was ordered by the House to be printed:—Held, that if this report contained a libel on an individual, the printer of the House of Commons, who sold it, was liable to an action; and that the resolutions of the House did not render this a privileged publication. (*Stockdale* v. *Hansard*, H. T. 1837, N. P., 7 C. & P. 731). So, an authority by the House of Commons to publish and sell their proceedings and reports:—Held, not a justification of the party publishing matter libellous of an individual. (*Stockdale* v. *Hansard*, 1836, N. P., 2 M. & Rob. 9).

‡ For the purpose of a libel, an attorney need not shew that he was certificated, or had practised. (*Lewis* v. *Walter*, T. T. 1824, K. B., 3 B. & C. 138, n.; S. C. 4 D. & R. 810).

ments that the plaintiff had carried on the business of an attorney, and been engaged as such in a certain cause, and that sharp practice in such profession was considered to be disreputable to the attorney practising the same:—Held, that such matter was libellous; and the averment, that the libel was ironical, coupled with the innuendo that the term, "honest lawyer," was used in a libellous sense, was sufficient.

(*b*) As to authors*. See, also, ante, p. 513.

(*c*) As to coachmen.

Clement *v.* Chivis, H. T. 1829. K. B. 9 *B. & C.* 172.

It is a libel to print of a coachman, "that he insulted passengers in the most barefaced manner."

Declaration complained of a publication which charged the plaintiff with having insulted two females and some gentlemen in a most barefaced manner; and the declaration also averred that special damage had been sustained; and the jury found a verdict for the plaintiff, but negatived the special damage.

The Court held, that the action was maintainable in respect of the publication, without proof of the special damage.

(*d*) As to ecclesiastical persons.

Archbishop of Tuam *v.* Robeson, T. T. 1828. C. P. 5 *Bing.* 17; S. C. 2 *M. & P.* 32.

Charging an archbishop with endeavouring to bribe a Catholic priest to change his creed, is a libel.

In an action for a libel, set forth in the declaration as follows: "Who do you think was the archbishop who promised M., the priest of the mountains, 1000*l.* in cash, and a living of 800*l.* a year? Why, no less a personage than the Archbishop of Tuam" (the plaintiff). The archbishop wrote to a Protestant clergyman, desiring him to make the offer, and to shew the letter, but not to surrender it into his possession, unless M. was disposed to accede," with an innuendo, that "the defendant meant, by the libel, that the plaintiff had offered the said M. 1000*l.* in cash, and a living of 800*l.* a year, if he would accede to become a Protestant clergyman." A motion was made in arrest of judgment, on the grounds that there were no introductory averments to explain the intent of the libel, nor anything on the face of the libel, as set out, to warrant the innuendo.

The Court held, that, after verdict, the declaration was sufficient.

(*e*) As to officers†.

* Whatever is fairly written of a work, and can be reasonably said of it, or of its author, as connected with it, is not actionable, unless it appear that the party, under the pretext of criticising the character of, takes an opportunity of attacking its author. In cases of libel, a subsequent publication, brought out, even after issue joined, may be evidence to shew the motives of the party. (*M'Leod* v. *Wakley*, H. T. 1828, N. P., 3 C. & P. 311).

† In an action for a libel, which is only libellous on a man in the execution of his office, where the plaintiff has stated, by way of inducement, his due dis-

(*f*) As to overseers.

WOODARD *v.* DOWSING, E. T. 1828. K. B. 2 *M. & Ry.* 74.

Charging an overseer with illegal practices towards paupers, whether an offence within the 55 Geo. 3, or not, is a libel.

A WRITTEN publication charged the plaintiff, an overseer of the poor, with illegal conduct towards the paupers, by forcing them to take goods at a disadvantage in lieu of money, (the writer evidently meaning to charge an offence under the 55 Geo. 3, c. 137, s. 6, but not stating facts applicable to that statute).

The Court held, that this was a libel, inasmuch as the conduct ascribed to the plaintiff, in his character of overseer, was oppressive and disgraceful, whether it amounted to a legal offence or not.

(*g*) As to servants. See, also, ante, p. 515.

CHILD *v.* AFFLECK, E. T. 1829. K. B. 9 *B. & C.* 403.

A letter, stating the misconduct of a servant, is not a libel, in the absence of malice.

IN an action for a libel, it appeared that the defendant, the plaintiff's former mistress, had, in a letter inquiring as to her character, stated acts of misconduct during the time of the plaintiff's being in her service, and also subsequently to her having left it, and the defendant had also stated the same to the persons who originally recommended the plaintiff to her.

The Court held, that the latter part of the letter was a privileged communication, and which the defendant was bound to make; and that the parol statement, having been made to the parties only who recommended her, was not officious, nor evidence of malice, which in such action is the gist, and must be expressly proved.

(*h*) As to tradesmen.

INGRAM *v.* LAWSON, M. T. 1839. C. P. 6 *Bing. N. S.* 212; S. C. 5 *Id.* 66.

A libel with respect to a tradesman requires no special damage.

IN an action against the defendant for a libel, published in a newspaper, alleged to be injurious to the plaintiff in his business and occupation of master mariner and shipowner, and stating that his ship was unseaworthy, and not fit for the reception of goods and passengers, upon an intended voyage to Calcutta; that upon her last voyage additional hands were obliged to be procured to enable her to complete her voyage; and that she was sold to certain Jews, for the purpose of taking out convicts.

The Court held, to be a libel on his business, and entitling him to recover damages, without proof of malice or allegation of special damage.

charge of its duties, the defendant cannot, on the general issue, give evidence of negligence in discharging them in answer to that allegation. (*Dance* v. *Robson*, 1829, N. P., 1 M. & M. 294). A letter, written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged from disclosure as an official communication; but if made bonâ fide, and without malice, such communication is not actionable as libellous, though some of the charges may not be true. (*Blake* v. *Pilfold*, 1832, N. P., 1 M. & Rob. 198).

IV. RELATIVE TO THE EXPRESS OR IMPLIED CONTRACT TO INDEMNIFY.

SHACKELL *v.* ROSIER, T. T. 1835. C. P. 2 *Bing. N. S.* 634.

A contract to indemnify against publishing libellous matter is illegal.

IN an action of assumpsit the declaration stated, in consideration the plaintiff would publish a certain libellous paper, and also, at the defendant's request, defend an action brought in respect thereof, the defendant promised to indemnify him against all damages and costs—

The Court held, that the promise was illegal, and the action not maintainable; and the extent of damages was too uncertain, and amounting to maintenance.

COLBURN *v.* PATMORE, T. T. 1834. Ex. 1 *C., M. & R.* 73; S. C. 4 *Tyrw.* 677.

An editor is not liable to his principal for inserting a libel in a literary publication.

THE plaintiff, having employed the defendant as editor of a literary work, was convicted of a libel published therein. In an action against the defendant, alleging his insertion of such libel without the plaintiff's knowledge—

The Court arrested the judgment, 1st, on the ground that it did not appear that the libel, published by the plaintiff, and whereof he was convicted, was the same as had been inserted in the work by the defendant; and 2ndly, that a party declared by the law guilty of a crime cannot be allowed by law to recover damages against another who has participated in its commission.

V. RELATIVE TO REPETITION OF SLANDER BY PUBLISHING IT IN PRINT.

M'GREGOR *v.* THWAITES, T. T. 1824. K. B. 3 *B. & C.* 24; S.C. 4 *D. & R.* 695.

IN an action for a libel—

There is a distinction between repeating slander and publishing it in print.

The Court said, that there may be a distinction between merely repeating slander and that of writing or publishing it in print. (*Lord Northampton's case*, 12 Rep. 133). To bring a case within the rule laid down in that case, the whole matter charged against the defendant must be also a subject of action against the parties originally uttering the slander, and the defendants must also give the plaintiff the means of establishing by evidence his right of action against such party.

VI. RELATIVE TO THE ACTION FOR.

(*a*) PARTIES TO*.

WILLIAMS *v.* BEAUMONT, M. T. 1833. C. P. 10 *Bing.* 260; S. C. 3 *M. & Scott*, 705.

The chairman of a company

THE Hope Assurance Company were authorized by stat. 53 Geo. 3, c. 206, to maintain actions and suits for recovering debts and en-

* In an action against the defendant for publishing a libel, it appearing that five packets, addressed to individuals, and inclosed in one addressed to him, had been received at the coach-office, where he was porter, and he delivered them:—Held that, if the jury found that he did so in the course of his business, and in ignorance of the contents, he was not liable; but, being primâ facie liable, it was for him to shew such ignorance. (*Day* v. *Bream*, 1836, N. P., 2 M. & Rob. 54).

may sue for a libel on the company*.

forcing claims or demands then due, or thereafter to be due to the said society, and to prosecute indictments and informations against those who might defraud them or injure their property, in the name of their chairman or secretary for the time being.

The Court held, that a libel upon the body generally, the tendency of which was to injure the partnership property, was within the meaning of the act; and that an action, in which the chairman of the body was the nominal plaintiff, was well brought.

(*b*) Form of action†.

(*c*) Declaration.

1. *Venue.*

Tallent *v.* Morton, H. T. 1828. C. P. 1 *M. & P.* 188.

The venue may be changed in an action for a libel‡.

In an action for a libel, contained in a letter written in Buckinghamshire, when it did not appear that it had been circulated elsewhere—

The Court allowed the venue to be changed from London to that county, on the usual affidavit that the cause of action (if any) arose there and not elsewhere.

Clementson *v.* Newcomb, H. T. 1835. Ex. 1 *C., M. & R.* 77; S. C. 3 *D. P. C.* 425.

Where a libel is published in two counties, and the defendant changes the venue, the plaintiff may bring it back.

On a rule nisi for setting aside a Judge's order, for changing the venue from London to Lincolnshire, in an action brought in London on a libel, it appeared that it had been published in London as well as in the county to which the venue had been changed.

The Court held, that the plaintiff was entitled to have it brought back, without entering into an undertaking to give material evidence there.

* So, where words imputing insolvency in trade are spoken of one of the partners in a firm, such individual partner may maintain an action of slander and recover damages for the injury done to him; and it is not necessarily to be considered as an injury to the partnership, for which a joint action can only be maintained. (*Harrison* v. *Bevington*, M. T. 1838, N. P., 8 C. & P. 708).

† The civil remedy for a libel is an action on the case.

‡ In an action on the case for a libel published in a country newspaper called the Liverpool Chronicle, the venue having been changed by the defendant, upon an affidavit that the cause of action arose in the county of Lancaster, and not elsewhere, and upon special grounds as to residence of witnesses, the Court refused to bring back the venue to the former county, upon an affidavit that the plaintiff had witnesses in London, and that notice of trial had been given and briefs prepared, it appearing that several witnesses for the defendant lived at Liverpool, and the defendant agreeing to withdraw the general issue, rely upon his plea of justification, and furnish the plaintiff with a copy of the newspaper. (*Greenslade* v. *Ross*, E. T. 1835, Ex., 3 D. P. C. 697).

2. *Statement of the Libel.*

RUTHERFORD *v.* EVANS, T. T. 1829. C. P. 6 *Bing.* 451; S. C. 4 *C. & P.* 74.

A declaration on a libel on an officer of a company need not allege the plaintiff's employment with precision, nor the whole of a letter, unless it qualifies the libel*.

IN an action for a libel, contained in a letter addressed "to the treasurer of the N. E. Company," and slandering the plaintiff in his employment as surveyor of the company:—Held, that it was not necessary to allege with extreme precision the description of the company, nor to prove the plaintiff's employment by deed, the libel being alleged of the plaintiff in that employment. The letter going on, after stating the libellous matter, to say that the writer had never disclosed the matter, nor ever would, except to the person he addressed, and his friend, which was not set out in the declaration—

The Court held, that, although the defendant might avail himself of the whole of the letter to repel malice, yet the omission of such part in no way qualifying the meaning of the libellous part set out, was not a ground of variance.

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3. *Innuendo.*

HARVEY *v.* FRENCH, M. T. 1832. Ex. 1 *C. & M.* 11; S. C. 2 *M. & Scott*, 591.

An innuendo not warranted by the libel is bad; but if the libel be intelligible without, it may be rejected.

THIS was an action for a libel. The libel appeared to be "threatening letters." The grand jury had returned a true bill against a gentleman of some property, named French, and the innuendo went to allege that it meant to insinuate that the plaintiff had sent an unsigned letter to one T., threatening to kill and murder the said T., with a view and intent to extort money.

The Court held, that such innuendo, as carrying the meaning far beyond the import of the terms of the libel, was bad; but that, as the words must be understood in their ordinary sense, and could

* So, in an action for a libel in a review, it is sufficient to set out the contents of an index (referring to an article in the body of the review) which is of itself a libel; and no reference need be made to the article itself, if the index contain, per se, primâ facie libellous matter. (*Buckingham* v. *Murray*, T. T. 1825, N. P., 2 C. & P. 46). Where the declaration on a libel stated that certain prosecutions had been preferred against M., and that, "in furtherance of such proceedings, certain sums of the parish funds had been appropriated to discharge the expenses;" but the libel charged the money to have been so applied after the proceedings had terminated:—The Court held, that, it being immaterial to the defamatory character of the libel when the money was so applied, the variance was immaterial. (*May* v. *Brown*, T. T. 1824, K. B., 3 B. & C. 113; S. C. 4 D. & R. 670). But a count in a declaration in an action for libel, charging that the defendant wrote of the plaintiff that he was a "man Friday" to another, was held bad, for want of an averment to shew that, by the term "Friday," as applied to the plaintiff, degradation and subserviency were intended to be imputed to him. (*Forbes* v. *King*, H. T. 1833, Ex., 1 D. P. C. 672). So, where a declaration purported to state a paragraph in a newspaper, (the libel), that plaintiff had formerly a house in P., and some time prior to that he had one in M., in both of which he contrived &c., omitting the words "of which:"—Held, a material variance. (*Cooke* v. *Smith*, E. T. 184, Ex., 1 M'Clell. 250). Where a libel was declared on, and the letter lost, and parol evidence given:—Held, not a case for amendment within the 9 Geo. 4. (*Brooks* v. *Blanshard*, T. T. 1833, Ex., 1 C. & M. 779; S. C. 3 Tyrw. 844; abridged, ante, p. 516).

not be read otherwise than as meaning that the grand jury had found a true bill against the plaintiff for sending threatening letters, the counts might be sustained, rejecting the innuendo as surplusage. A bill of indictment for sending a threatening letter must import an unlawful threatening letter.

GOMPERTZ *v.* LEVY, M. T. 1838. Q. B. 1 *P. & D.* 214.

An innuendo must not enlarge the meaning of the word.

CASE for a libel. The declaration only alleged the intention to impute misconduct, and that the defendant maliciously published a notice, "that any person giving information where property belonging to the plaintiff, a prisoner in the King's Bench prison, might be found, should receive five per cent. on the goods recovered;" an innuendo, that thereby the plaintiff had been guilty of concealing his property with a fraudulent and unlawful intention, on demurrer—

The Court held bad, as enlarging the meaning of the terms used.

GARDINER *v.* WILLIAMS, T. T. 1835. Ex. 2 *C., M. & R.* 78; S. C. 3 *D. P. C.* 796.

Although too large it is cured by verdict.

THIS was an action for a libel, innuendo imputing to the plaintiff larceny of plants and flowers of the defendant. On motion in arrest of judgment, on the ground that larceny could not be committed of flowers, and so the innuendo too large, after verdict—

The Court refused the rule; as they must be taken to have been such flowers as were capable of being the subject of larceny, by being detached or otherwise, and the innuendo incongruous, and might be rejected.

ADAMS *v.* MEREDEW, T. T. 1828. Ex. 2 *Y. & J.* 417.

The libel must be actionable on the face of it, or an innuendo to make it so; the defect is not cured by verdict.

ACTION for a libel; the declaration alleging the plaintiff to be justice of the peace, and the libel published of him as such justice; the libel in substance stating the plaintiff to have been chairman of the Finance Committee of the county, and to have audited accounts, containing items to a large amount, nominally to furnish lodgings for the Judges, but in reality for the accommodation of the magistrates, as the sheriff had always provided suitable lodgings without putting the county to any expense; innuendo, thereby meaning that the plaintiff had conducted himself corruptly and improperly in his office of justice.

The Court held, that the libel was not on the face of it actionable; and that, there being no prefatory averment to which the innuendo by referring might have shewn it to have been an offence in him to have so audited the accounts, the defect was not cured by verdict, and judgment was therefore arrested.

GOLDSTEIN *v.* FOSS, H. T. 1827. K. B. 6 *B. & C.* 154.

And if the libel be not connected with the introductory matter, so as to warrant the innuendo,

ACTION for a libel. The declaration, in the introductory part, set out the nature and objects of the "Society of Guardians, for the Protection of Trade against Swindlers and Sharpers," of which defendant was the secretary, and then alleged the publishing of the libel as a printed communication by the secretary, that the plaintiffs "were reported to the society as improper to be proposed to be

balloted for as members thereof;" with an innuendo (thereby then and there meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society). Upon motion for arrest of judgment—

judgment will be arrested.

The Court held, that the libel was not sufficiently connected with the introductory matter; and that, without such connexion, the words did not warrant the innuendo, nor were they actionable in themselves.

CLEMENT *v.* FISHER, M. T. 1827. K. B. *7 B. & C.* 459; S. C. *1 M. & Ry.* 281.

IN an action on the case for a libel, one count of the declaration alleged that the defendant published a libel of and concerning the plaintiff, containing &c. the false libellous matters following (without saying of and concerning the plaintiff). On error—

After stating the libel, the omission of the words, " of and concerning the plaintiff," is a ground of error.

The Court held, that, for want of averment that the particular matter was of and concerning the plaintiff, and no innuendo that it related to him, the count was bad; and a venire de novo was awarded.

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4. *Of several Counts.*

HUGHES *v.* REES, E. T. 1839. Ex. *4 M. & W.* 204.

THE declaration alleged and set out a libellous paragraph in the defendant's newspaper, and afterwards, &c. (stating other libellous matters in subsequent newspapers)—

A declaration, stating libels in several newspapers, each must be deemed a separate count.

The Court held, that each allegation was to be considered a separate count; one of the latter being in the terms, " We again assert the cases formerly put by us on record, we assert them against (the plaintiffs); we again assert that they are such as no gentleman or honest man would resort to:"—Held to be construed, not as used merely in denial of some assertion made by the plaintiff, but asserted as an accusation of the plaintiff, and libellous.

(*d*) PLEAS.

1. *General Issue.*

MANNING *v.* CLEMENTS, H. T. 1831. C. P. *7 Bing.* 362; S. C. *5 M. & P.* 211.

IN an action for a libel on the plaintiff, in the way of his trade, the declaration alleged that the plaintiff exercised and carried on his trade in an honest and lawful manner. The defendant pleaded not guilty. The plaintiff gave general evidence that he was a manufacturer of bitters, and proved the publication of the libel, and the innuendo that it related to him in the way of his trade; and after he had closed his case, the defendant offered evidence, with a view to prove that what the plaintiff sold was not bitters, but a composition of a very different description; that in fact the article in question was composed of the most noxious ingredients; that the plaintiff's was not a lawful trade, and that a large quantity of it had actually been condemned by the Court of Exchequer, and the plaintiff fined. This

Averment that the plaintiff carried on his trade in an " honest and lawful manner;" plea not guilty:—Held, that the defendant might shew the allegation was not true, because the plaintiff manu-

factured the article illegally*.

evidence was objected to on the part of the plaintiff, on the ground that it amounted in effect to proof of the truth of the charge imputed by the libel, whereas no justification was pleaded. *Park*, J., however admitted the evidence as proof of the illegality of the plaintiff's trade, not as proof of the truth of the libel. The Jury returned a verdict for the defendant. On motion for a new trial—

The Court held, that under the general issue the defendant might give in evidence that the plaintiff, under the pretence of manufacturing bitters, made and sold a composition of a very different description, not by way of justification of the libel, but as to the truth of the plaintiff's allegation as to his trade.

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2. Pleas of Justification.

INGRAM *v.* LAWSON, M. T. 1838. C. P. 6 *Scott*, 775; S. C. 7 *D. P. C.* 125; S. C. 5 *Bing. N. S.* 66.

A plea of justification must justify the whole;

IN an action for a libel, it appeared that, the plaintiff's ship being advertised for passengers, &c., the defendant published that she was unseaworthy, and had been bought by the Jews to take out convicts.

The Court held, that a plea to the whole declaration that the ship was unseaworthy was insufficient, as the latter allegation was calculated to deter passengers from applying.

COOPER *v.* LAWSON, M. T. 1838. K. B. 1 *P. & D.* 15.—S. P. COOKE *v.* SMITH, E. T. 1824. Ex. 1 *M'Clell.* 250.

if not, the plaintiff will be entitled to damages on the part not answered;

THE statement in a newspaper, professing to give a report on an election petition, went on to comment on a party, bail for one of the petitioners, stating, "he is hired for the occasion," and the plea justified only the former part of the libel.

The Court held, that, if the part left uncovered would by itself have formed a substantive ground of action, the plaintiff would be liable in damages; aliter, if the comment were only a necessary inference from the facts stated.

CLARKSON *v.* LAWSON, M. T. 1830. C. P. 6 *Bing.* 266; S. C. 3 *M. & P.* 605.

or the defendant may demur.

IN an action for a libel, imputing to the plaintiff, a proctor, that he had been thrice suspended from practice for extortion, the defendant, in his plea of justification, averred that the plaintiff had been suspended once.

The Court held, that, inasmuch as the plea professed to be a justification of the whole libel, and did in fact only justify a part, the plea was bad on demurrer.

CLARKSON *v.* LAWSON, H. T. 1831. C. P. 6 *Bing.* 587; S. C. 4 *M. & P.* 356.

If a libel be severable, the

THE first count in a declaration for a libel alleged an imputation that the plaintiff, a proctor, had been three times suspended; and

* By the modern rules of pleading in actions for libel, all the inducement is admitted if it be not traversed. (*Fradley* v. *Fradley*, 1838, N. P., 8 C. & P. 572). A letter of complaint, written to the Postmaster-General, bonâ fide, of even imaginary grievances, would be privileged, and the defendant, under the general issue, may shew that it was written under such circumstances as would make it a protected communication. (*Woodward* v. *Lander*, 1834, N. P., 6 C. & P. 548).

the second count alleged the having been suspended three times for extortion. The defendant, in his plea, as to so much of the libel as imputed one suspension, justified it as being true. On demurrer—

plea may be drawn accordingly.

The Court held, that the charge contained in the libel was severable, inasmuch as the measure of damages, on an unfounded charge of one suspension, would be different from those on an unfounded charge of three suspensions; and, therefore, the plea and answer to part was good:—Held, also, that it was sufficiently applicable to the charge in the first count, if not to that in the second.

LILLIE *v.* PRICE, M. T. 1836. K. B. 5 *D. P. C.* 432; S. C. 1 *N. & P.* 16.

THIS was an action against the defendant for publishing a libel. Plea, not guilty. The defendant, in his defence, alleged that the supposed libel was a communication made by him as an attorney, in a letter to his client, and was, therefore, a privileged communication. Lord *Denman*, C. J., told the jury it was a privileged communication, and directed them to find a verdict for the defendants, which they found accordingly. On motion for a new trial—

A privileged communication need not be pleaded.

Lord *Denman*, C. J.—This case was tried before me; in which the defence was, that the letter which contained the alleged libel was a privileged communication. It was objected that such a defence should have been pleaded, and could not be gone into under the general issue. We are all of opinion, on conferring with the other Judges upon the subject, that this is a defence which may be given in evidence under the general issue, and that it is not required that it should be pleaded. The rule, therefore, in this case will not be granted.—Rule refused.

MOORE *v.* TERRELL, E. T. 1833. K. B. 1 *N. & M.* 559.

IN an action by an attorney for libel, alleging breaches of confidence, the pleas justified and alleged the disclosure of confidential communications of his clients.

In an answer to a libel, alleging breaches of confidence as an attorney, the defendant may plead that he disclosed confidential communications;

The Court held, that it was not necessary it should be of such a privileged nature as to have prevented his being examined as a witness thereon; and that the jury should have been directed to say whether they were or not confidential communications in the enlarged and popular sense of the term. The plea having also alleged that the townsmen of the plaintiff had taken offence at the plaintiff's conduct, and committed outrages against him:—Held, that it was an essential part of the plea, and should have been separately submitted to the jury.

DE CRESPIGNY *v.* WELLESLEY, H. T. 1829. C. P. 5 *Bing.* 392; S. C. 2 *M. & P.* 695.

To an action for a libel, plea of justification for the publishing of the libel, that, at the time of publishing it, the name of the person who communicated it to the defendant was also published.

but the defendant cannot plead that he disclosed the name of the party who informed him.

Per Cur.—We do not hesitate to say, that, even if we were to admit (which we beg not to be considered as admitting) that in oral slander, when a man, at the time of his speaking the words, names the person who told him what he relates, he may plead, to an action brought against him, that the person whom he names did tell him what he related. Such a justification cannot be pleaded to an action

for the re-publication of the libel. If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every part of the globe. The effect of this is very different from that of the repetition of oral slander.

FLINT *v.* PIKE, T. T. 1825. K. B. 4 *B. & C.* 473; S. C. 6 *D. & R.* 528.

So, a plea, that the libel was a true and accurate report of a trial, if the declaration raised no issue as to the truth, &c.;

DECLARATION for a libel. The defendant pleaded that the libel was in substance a true and accurate report of what passed at a trial. On demurrer—

The Court held the plea bad; it appearing that the libel did not state facts upon which issue might have been taken as to the truth and accuracy of the report, but the speeches of counsel, containing severe observations on the conduct of the plaintiff acting as an attorney. Although counsel are privileged in making such observations, yet, if injurious to the character of individuals, a party is not justified in publishing them.

M'GREGOR *v.* THWAITES, T T. 1824. K. B. 3 *B. & C.* 24; S. C. 4 *D. & R.* 695.

or, pleas, that the libel only contained a correct report of proceedings before a justice with a view to taking his advice and not in his judicial character,

TO an action for a libel, the defendant pleaded that the libel contained only a correct report of proceedings before a magistrate, applied to for his advice and not acting in his judicial character.

The Court held, 1st, that it was insufficient; the proceeding being in no way connected with the judicial character of the magistrate; and 2ndly, that it was not a privileged publication, on the ground that the defendants, at the time of publication, named the parties who originally uttered the slander, and a rule for entering judgment for the plaintiff, non obstante veredicto, was made absolute.

DUNCAN *v.* THWAITES, M. T. 1824. K. B. 3 *B. & C.* 556; S. C. 5 *D. & R.* 447.

or that the said supposed libels were true, are bad pleas.

TO an action for a libel, the defendant pleaded as a justification, that the matters contained a correct report of the proceedings at Bow-street, in the course of a preliminary inquiry on a charge of indecent assault on a female child. Another plea alleged, that the several matters and things in the said several supposed libels were true. On demurrer—

The Court held the first plea bad, and the second plea also bad, as it left it uncertain whether the libels were a true report, or that the facts contained in such report were true; if the latter, it was too general, some of the counts not alleging that any proceedings had taken place before a justice. A plea, that the supposed libel was nothing more than a correct report of proceedings which took place before the justice at a public office, was bad, as containing no answer to the action; also a plea, setting out the proceedings and the depositions taken verbatim, shewing that the libel was not a fair and accurate report, was also clearly not sustainable; but a plea to one of the libels, stating facts, and the result of what had been done by such justices, without any comment on the facts, was good and sufficient in law.

MOUNTNEY *v.* WATTON, T. T. 1831. K. B. 2 *B. & Ad.* 673.

A DECLARATION for a libel, commencing "horse-stealer," and followed by a statement of facts, and concluding that the defendant published it with intent to cause it to be believed that the plaintiff had been guilty of feloniously stealing a horse; plea, except as to the word "horse-stealer," a justification, stating circumstances inducing suspicion, that the plaintiff had been guilty of the fact. On demurrer—

A plea of justification, stating mere inducement of suspicion, is bad on demurrer*.

The Court held, that the plea was insufficient; and semble, where an alleged libel contains matters which are divisible, one part may be justified separately, if a proper justification can be made out as to the rest.

(*e*) REPLICATION†.

(*f*) EVIDENCE.

1. *For the Plaintiff.*

1.—*In General*‡.

REX *v.* GRANT, H. T. 1834. K. B. 3 *N. & M.* 106.

IN an action for a libel, at the trial it was taken for granted that the transactions alleged in the introductory part had reference to the

The Judge has a right to know

* Upon the trial the plaintiff cannot object to the insufficiency of a plea of justification, as he might have demurred; but if the justification be proved, the defendant is entitled to a verdict on that plea. (*Edmonds* v. *Walter*, 1820, N. P., 3 Stark. 7).

† Upon a plea of justification only to a libel, and the replication de injuriâ:—Held, that, with a view to the amount of damages, the plaintiff might shew the manner of publication. (*Viners* v. *Sorell*, 1835, N. P., 7 C. & P. 163).

‡ In an action for a libel, the defendant has a right to have the whole of the publication read, from which the passages charged are extracts. (*Cooke* v. *Hughes*, T. T. 1824, N. P., 1 Ry. & M. 112). As, where the libel was contained in a newspaper:—Held, that the defendant had a right to have other parts of the same paper referred to in the libel, read as part of the plaintiff's case. (*Thornton* v. *Stephen*, 1835, N. P., 2 M. & Rob. 45). In an action for libel, general evidence, that the plaintiff has been in the habit of libelling the defendant, is inadmissible. (*Wakley* v. *Johnson*, T. T. 1826, N. P., 1 Ry. & M. 422). Where the terms of the libel are equivocal, subsequent words of the same import may be given in evidence; aliter, where the words are unambiguous, and the subsequent words of themselves actionable. (*Pearce* v. *Ornsby*, H. T. 1835, N. P., 1 M. & Rob. 455.—S. P. *Symmons* v. *Blake*, 1835, N. P., 1 M. & Rob. 477). On the trial of an action against the publisher of a monthly periodical, for a libel contained in it, articles published from month to month, alluding to the action, and attacking the plaintiff, are receivable as evidence, quo animo the libel was published, and as shewing that the publisher of the work considered it as applying to the plaintiff. (*Chubb* v. *Westley*, T. T. 1832, N. P., 6 C. & P. 436). But in an action for a libel, written in a disguised hand, it was proposed to put into the hands of the jury a book, in which were entries, which a witness swore that he saw the defendant make at the time, in order that the jury might compare those entries with the libel:—Held, that it could not be done. (*Waddington* v. *Cousins*, M. T. 1836, N. P., 7 C. & P. 595). If a libel, purporting to be a circular, written by the secretary of a society for the protection of trade against swindlers, imputes certain specific facts to the plaintiff, a witness cannot be asked what he understands by finding a person's name inserted in such circular; but he may be asked

the purpose for which evidence is tendered.

libel, and the object of the evidence tendered was to convince the jury of the truth of the libel; and the general issue only being pleaded, the Judge rejected the evidence. The Court refused a new trial, upon the suggestion that it had been offered with the view of shewing the nature of the transactions; that purpose not having been made known to the Judge at the trial, he has a right to know the purpose for which evidence is tendered.

The Court will not allow affidavits to be read with the view of contradicting the statement of the Judge.

2.—*Of the Publication.*

WARD *v.* SMITH, T. T. 1830. C. P. 6 *Bing.* 749; S. C. 4 *C. & P.* 302.

Sending a letter to another's correspondent is a sufficient publication*.

THE plaintiffs, having obtained a contract for a supply of timber for the navy, agreed with the defendant for a share in it. The contract, however, not turning out so advantageous in its terms as was anticipated, the defendant withdrew himself from it, and afterwards wrote to a house at Sierra Leone, who had engaged to supply the timber to the plaintiffs, a letter reflecting on the character of the plaintiffs, and tending to embarass them. The jury having found a verdict for the defendant—

The Court directed a new trial, being of opinion that the sending the letter to his correspondent was a sufficient publication.

WARREN *v.* WARREN, T. T. 1834. Ex. 1 *C., M. & R.* 250; S. C. 4 *Tyrw.* 850.

A letter addressed to a person in Scotland, with the seal broken,

IN an action for a libel, contained in a letter, the letter was produced by the plaintiff, with the seal broken, and bearing the post-marks of Colchester and London, and the Colchester postmaster proved that he received it from the post-office at Hawkesley, in

whether there is any meaning in such a circular beyond what appears on the face of it. If the members of such a society agree to contribute towards all law expenses respecting it, and an action be brought against the secretary of it for a libel, it seems that a member of the society is a competent witness for the defence, because an agreement by parties, that they will bear each other harmless in doing wrong, is void. In this case a member of the society was examined for the defence, but the secretary released him before he gave his evidence. (*Humphreys* v. *Miller*, T. T. 1829, N. P., 4 C. & P. 7).

* In an action on the case for a libel in a newspaper, the plaintiff cannot give evidence of the contents of a placard posted in the window of a third person, although the placard states what will appear in the defendant's newspaper respecting the plaintiff, and that which it foretold does appear accordingly, unless there be evidence to shew it was published by the defendant. (*Raikes* v. *Richards*, H. T. 1827, N. P., 2 C. & P. 562). In an action for a libel, contained in an article against church-rates, written by the defendant, and published in the T. S. newspaper, the MS. in the handwriting of the defendant, addressed, "To the Editor of the T. S.," and sent to the T. S. office, is evidence to shew that the defendant intended the article to be published in that newspaper. The plaintiff may also, for the same purpose, give in evidence handbills on the same subject, published by the defendant about the same time; and, to shew that the libel was published with an intent to injure the plaintiff, evidence may be given that one of the handbills was carried backwards and forwards before his door. (*Bond* v. *Douglas*, M. T. 1836, N. P., 7 C. & P. 626). The post-mark on a letter:—Held, to be primâ facie evidence of a publication. (*Shipley* v. *Todhunter*, T. T. 1836, N. P., 7 C. & P. 680).

Essex, to be forwarded to Scotland. The handwriting was admitted to be that of the defendant. Objections were taken, on the part of the defendant, that the proof of publication was insufficient.

Per Cur.—The production of a letter in the defendant's handwriting, containing a libel, with the seal broken, and proof that it has passed regularly through the post-office, is sufficient primâ facie evidence that it was received by the party to whom it was addressed, and of publication to him.

and a post-mark of a place in England, where it was proved to have been received and forwarded, is evidence of publication.

COOK *v.* WARD, H.T. 1830. C. P. 6 *Bing.* 409; S. C. 4 *M. & P.* 99.

IN an action for a libel, the identical paper was produced by the distributor of stamps, marked with various charges corresponding with the sum paid by the defendant to the distributor.

The Court held, 1st, that it was evidence to go to the jury of a publication by the defendant; and, 2ndly, that it was libellous to print and publish a ludicrous story of the plaintiff, exposing him to ridicule, notwithstanding it appeared that the plaintiff himself had told it of himself; and evidence of the plaintiff having been exposed to public laughter at a vestry was evidence, as identifying the subject of the libel, and proving the consequences of the publication.

The identical newspaper from the Stamp Office is evidence of a publication to go to the jury.

MAYNE *v.* FLETCHER, E. T. 1829. K. B. 9 *B. & C.* 382.

IN an action for a libel published in a newspaper, the plaintiff produced a certified copy of the affidavit lodged at the Stamp Office, in pursuance of 38 Geo. 3, c. 78, s. 1, in which the defendant was described as the printer and publisher of the above newspaper, and then produced a newspaper containing the libel, and corresponding in the title, and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit. It was contended that this was no evidence of publication.

Per Cur.—The plaintiff or prosecutor is, by the express terms of the statute, exempted from bringing such evidence, after having produced the affidavit lodged at the Stamp Office, and a newspaper corresponding in certain respects with that mentioned in the affidavit.

So, a certified copy of the affidavit, lodged at the Stamp Office, and a newspaper containing the libel, corresponding with the paper described in the affidavit, is evidence of the publication.

3.—*Of the Libel.*

YRISARRI *v.* CLEMENT, H. T. 1826. C. P. 3 *Bing.* 432; S. C. 2 *C. & P.* 223.

THE declaration alleged that there were such states as C. and B.; that the plaintiff and one H. had been appointed minister plenipotentiary and consul-general respectively from those states to this country. The libel on the face of it admitted that there were such states; and, it being proved at the trial that the plaintiff had been appointed such officer for the one state and H. for the other—

The Court held, that the allegations were sufficiently made out: —Held, also, that the words "he lost no time in transferring himself, together with £— of John Bull's money, to Paris, where he now out-tops princes in his style of living," did not support the innuendo, that the plaintiff had thereby cheated *John Bull.*

Declaration for a libel on A. and B., consuls-general of certain states, C. and D., is proved, if it appears that A. is consul for C. and B. for D.*

* If a foreign state is recognised by *this* country it is not necessary to support an allegation, which describes it as a state, to prove that it is in fact an existing

4.—Of the Malice.*

5.—Application of Libel to Plaintiff†.

6.—Special Character of Plaintiff.

RAMAGE *v.* RYAN, M. T. 1832. N. P. 9 *Bing.* 333; S. C. 2 *M. & Scott,* 421.

Libel on a surgeon. Plea, "that he had faithfully and honestly dis-

To an action for a libel, a plea of justification stated, that the defendant, a medical man, in refusing to act with the "plaintiff, had faithfully and honestly discharged his duty to his medical brethren." Upon the trial of the present action, the defendant's

state; but, if it be not so recognised, then such proof becomes necessary and may be admitted. If, in the inducement in a declaration in an action for a libel, two places are described as "states," and in the libel itself allusion is made to one, and the other is actually mentioned under the title of "neighbouring state," it is not necessary that the plaintiff at the trial should prove that either of them were in fact *states.* (*Yrisarri* v. *Clement,* M. T. 1825, N. P., 2 C. & P. 223). In an action for a libel, which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character, the plaintiff alleged in his declaration that his house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the defendant's pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book, but no evidence was given of the payment of any subscription:—Held, that there was evidence to go to the jury in support of the allegation in the declaration. The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—Held, that the plaintiff could not go into evidence to shew that his wife was a respectable person, as on these pleadings she must be taken to be so:—Held, also, that the plaintiff could not go into evidence to shew that his wife had become ill and died soon after the publication of the libels. *Guy* v. *Gregory,* M. T. 1840, N. P., 9 C. & P. 584). Where it was to be plainly inferred from the general terms of the libel that it was the object of the writer to represent the plaintiff as holding a situation of trust and confidence, and that he had abused it:—Held, that it was quite sufficient to sustain the plaintiff's allegation in his declaration of his holding such situation. Statements in a libel render it unnecessary to give evidence of the truth of averments in the declaration corresponding with those statements, and have the effect of dispensing with formal proof. (*Bagnall* v. *Underwood,* H. T. 1823, Ex., 11 Price, 621). Where the libel (a song) from which the publication took place was lost, and the printer produced a similar one printed at the time, which was proved to correspond with that lost:—Held, sufficient. (*Johnson* v. *Hudson,* E. T. 1817, K. B., 7 Ad. & E. 233, n.). If the declaration in case for a libel state, inter alia, that at a certain place certain meetings for the promotion of sedition and blasphemy had been held, and that the defendant published of and concerning the plaintiff, and of and concerning the other matters, and of and concerning the said meetings, a libel, charging him among other things with having taken the chair at the said place, but not saying any thing of the character of the meetings there, it will not be a ground of nonsuit should the plaintiff, at the trial, fail to prove that the meetings were such as he described in his inducement. (*Chalmers* v. *Shackell,* T. T. 1834, N. P., 6 C. & P. 475).

* In an action against the publisher of a magazine containing the libel, evidence of personal malice of the editor against the plaintiff:—Held, inadmissible. (*Robertson* v. *Wylde,* 1836, N. P., 2 M. & Rob. 101).

† If, in a libel, asterisks be put instead of the name of the party libelled, to make it actionable it is sufficient that the party should be so designated, that those who know the plaintiff may understand that he is the person meant, and it is not necessary that all the world should understand it; but, if witnesses, who state that they understand that the plaintiff is the person, also say that they were enabled so to understand by the perusal of another libel, with which the defendant had no concern, their evidence ought to be laid out of the case. (*Bourke* v. *Warren,* T. T. 1826, N. P., 2 C. & P. 307).

counsel proposed to call Mr. Brodie, an eminent surgeon, to say whether he would meet the plaintiff in consultation, but the Chief Justice held such evidence to be inadmissible. The defendant's counsel then proposed to ask Mr. Brodie, whether Dr. Tweedie, in refusing to consult with the plaintiff, had honourably and faithfully discharged his duty to the medical profession. The Chief Justice thought that question ought not to be put.

And the Court held, that the defendant could not give in evidence the opinion of a medical witness on that point; it being one on which the jury were as capable of forming an opinion as the witness himself.

charged his duty to his medical brethren:—Held, that a medical witness could not be asked as to the conduct of the defendant in the profession*.

7.—*Of the Damage*†.

8.—*Questions for the Jury*‡.

PARMITER *v.* COUPLAND, H. T. 1840. Ex. 6 *M. & W.* 105.

IN an action for a libel—

The Court held, the Judge is not bound as a matter of law to tell the jury whether the publication complained of is a libel, though he may as a matter of advice give them his opinion as to the nature of the publication. The correct course is for the Judge to give the jury the legal definition of a libel, and then refer to their consideration the particular publication, requiring them to say whether it falls

It is the duty of the Judge to tell the jury the legal definition of a libel, and then for the jury to say whe-

* The declaration in an action for libel alleged that the plaintiff was a good and faithful subject, &c.; and that he was a medical practitioner; and stated the libel to have been published of and concerning him, and of and concerning him in his said practice. No evidence was given of any license or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man but merely as "physician extraordinary to several ladies of distinction," and "doctor, or rather quack:"—Held, that this did not withdraw the claim to damages in the medical capacity from the consideration of the jury; but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character. (*Long* v. *Chubb*, H. T. 1832, N. P., 5 C. & P. 55).

† In an action for libel the rule of law is not, that, if the plaintiff relies only on general injury to his business, he may shew by witnesses the general diminution of that business, because the law assumes the existence of a general injury, and if the plaintiff seeks specific damages he must give specific evidence. In such an action, after the plaintiff has proved the publication of the libel in one newspaper, evidence may be given for the purpose of shewing malice, that the defendant went to the editor of another newspaper and procured the insertion of the libel in that paper, stating that he had got it inserted in one already; and the circumstance of there being a count in the declaration, charging the second insertion as a distinct publication, will not make any difference as to the admissibility of the evidence. (*Delegall* v. *Highley*, M. T. 1837, N. P., 8 C. & P. 444). In an action for a libel, which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character, the woman being the plaintiff's wife; the plaintiff cannot go into evidence to shew that soon after the libel his wife became ill, and the effect of the libel accelerated her death. (*Guy* v. *Gregory*, 1840, N. P., 9 C. & P. 584).

‡ Where a plea to an action of libel justifies that the facts charged against the plaintiff are true, and the comments bonâ fide, it is properly left to the jury to consider, not only whether the facts are proved, but whether also the comments are bonâ fide, if they are of themselves actionable and are not necessary inferences from the facts. (*Cooper* v. *Lawson*, 8 Ad. & E. 746; S. C. 1 P. & D. 15).

ther the facts constitute the offence.

within that definition or not; and, if they are of opinion that it does, then whether it is calculated to injure the plaintiff's character. There is a difference between publications relating to public and private individuals, and what would be a libel on a private person might not be a libel if applied to him in his public capacity; but an imputation of corrupt motives would in any case be libellous.

BAYLIS *v.* LAWRENCE, E. T. 1840. Q. B. 3 *P. & D.* 526; S. C. 11 *Ad. & E.* 920.

The Judge is not bound to tell the jury whether the matters amount to a libel or not.

CASE for libel. Pleas, not guilty, and a justification. Lord *Abinger*, C. B., left it to the jury to say whether this was a libel or not. The jury returned their verdict in the following terms:—"The letter is a very strong one; but, in our judgment, it does not amount to a libel." Verdict for the defendant on the general issue, and for the plaintiff on the second plea. His Lordship being of opinion that the justification was not made out, on a rule nisi for a new trial on the ground of misdirection—

The Court held, that, on the plea of not guilty, the Judge is not bound to direct the jury, whether in his opinion the matter published amounts to a libel or not, but may leave this question entirely for their decision.

WRIGHT *v.* WOODGATE, M. T. 1835. Ex. 2 *C., M. & R.* 573.

The conclusions to be drawn from an alleged libel, as well as malice, are questions for the jury.

IN an action for a libel—

The Court said, where the occasion on which the alleged libellous communication is made rebuts the inference primâ facie arising from the statement, it puts the plaintiff upon shewing that there is malice in the fact; but it may be made out, not by extrinsic evidence only, but by the conclusions to be drawn by submitting the libel itself to the consideration of the jury: where the Judge, in the absence of extrinsic evidence, intimated an opinion that they could not reasonably act upon it in favour of the plaintiff, and the question of malice was left to them, the Court refused a new trial, or to enter a nonsuit.

FISHER *v.* CLEMENT, H. T. 1830. K. B. 10 *B. & C.* 472.

The Court refused a new trial where the Judge told the jury the question was whether the tendency of the libel was injurious to the plaintiff, and the intention was to be collected from the libel itself*.

IN an action for a libel, Lord *Tenterden*, in his charge to the jury, observed, that the plaintiff complained that the defendant published the article, intending thereby to impute what had been stated in the libel, published by Stockdale, was true. Then his lordship proceeded: "If it really was intended by this publication to cast reflections on the plaintiff, he is entitled to your verdict. If you think it was not intended to cast any reflection upon the plaintiff, but upon Stockdale and Harriet Wilson only, you will find for the defendant." But it appeared also from a note taken by one of the learned counsel, that his lordship added, "If you think any one would receive an unfavourable impression of Fisher, you will find for the plaintiff." On motion for a new trial—

* Where one newspaper copied a libellous paragraph from another, adding the word "fudge" at the close:—Held, in an action by the party libelled against the publisher of the paper in which the word "fudge" was added, that it was for the jury to say whether the object was to vindicate the character of the party by the ad-

The Court said, as the direction of the Judge was substantially, whether the tendency of the libel was injurious to the plaintiff, and that they were to collect the intention of the defendant upon the libel itself, they must refuse a new trial.

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2. *For Defendant.*

MORRISON *v.* HARMER, T. T. 1836. C. P. 3 *Bing. N. S.* 758.

CASE for a libel; the plea, justifying the libel, gave no answer to particular scurrilous and opprobrious terms used in it—

Proving the gist of the libel stated in the plea is sufficient*.

The Court held, that, not containing any ground of charge or imputation against the plaintiff, distinct from that which was the gist of the libel, and the gist of which was justified by the plea, the plea was sufficient, and a rule to enter up judgment non obstante veredicto refused; held also, that under an allegation in the libel, that the defendant had crushed the Hygeist system of wholesale poisoning, and that several vendors had been convicted of manslaughter, it was not necessary for the defendant to prove that the system had been entirely crushed, and that proof of the conviction of two vendors for manslaughter sufficiently proved the plea, although the evidence as to the death being occasioned by not complying with the printed regulations in some respects varied from the allegation, there being evidence for the jury as to the cause of death.

dition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken. (*Hunt* v. *Algar*, M. T. 1833, N. P., 6 C. & P. 245).

* A plea of justification, in an action for a libel, contained three material allegations, as to one of which the jury, in the course of the summing up, expressed themselves satisfied that the proof failed. The Judge told them, that, to warrant a finding in favour of the defendant, they must be satisfied that all three of the allegations were substantially made out. The jury, after two hours' deliberation, returned a verdict for the defendant upon that plea. The Court refused to set it aside. (*Napier* v. *Daniell*, E. T. 1836, C. P., 3 Scott, 417). In an action for a libel, to support a plea of justification, stating that the plaintiff had forged and uttered, knowing it to be forged, a certain bill of exchange, to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff if he were on trial for those offences; but if the evidence falls short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration in estimating the damages. (*Chalmers* v. *Shackell*, T. T. 1834, N. P., 6 C. & P. 475). And in an action for libel, published in a newspaper, the defendant cannot go into evidence in mitigation of damages to shew that the same libel had appeared in another newspaper, from which the plaintiff had already recovered damages; but the defendant may shew that he copied the libel from another newspaper, and omitted several passages contained in that newspaper, which reflected on the character of the plaintiff. (*Creevy* v. *Carr*, T. T. 1835, N. P., 7 C. & P. 64). So, where a libel purported to be a report of what had occurred before one of his Majesty's commissioners of inquiry respecting corporations:—Held, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but he might give such evidence in mitigation of damages; held also, that if he did so the plaintiff might give evidence in reply, to shew the inaccuracy of the report. (*Charlton* v. *Watson*, 1834, N. P., 6 C. & P. 385.) But semble, that, in an action for a libel, evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification, which were on the record, have been withdrawn before the trial, and the plaintiff in consequence is not prepared with evidence to sever the defendant's proof. (*East* v. *Chapman*, H. T. 1827, N. P., 1 M. & M. 46; S. C. 2 C. & P. 570). In an action for a libel, the defendant cannot, under the general issue, give evidence of any

STOCKDALE *v.* TARTE, M. T. 1836. K. B. 4 *Ad. & E.* 1016.

The plaintiff's own allegations in his declaration may be used in support of the plea of not guilty;

To an action for a libel, the defendant pleaded not guilty, and a justification, that the libel was a true report of what had passed in a court of justice, on a charge of conspiracy against the plaintiff and others, both of which were found for the defendant. The counsel who moved the judgment against the plaintiff being called as a witness, and having proved that he had stated the plaintiff to have (set out as an overt act of the conspiracy) written a letter which was alleged to have been written, not by him, but by a co-conspirator—

The Court held, that the plaintiff's own allegation making a necessary part of his case, the character of the publication was part of the issue of not guilty, and that the question was properly left to the jury upon that plea.

WATTS *v.* FRASER, H. T. 1837. K. B. 2 *N. & P.* 157; S. C. 7 *Ad. & E.* 223.

but evidence that the plaintiff libelled the defendant is not admissible, unless it appears that it came to his knowledge.

IN an action for libel, the defendant sought to give in evidence libellous publications by the plaintiff of the defendant in newspapers and periodical works.

The Court held, that, to make such admissible, it must be shewn that they came to the knowledge of the party supposed to be provoked thereby, and that the Court could not infer, from the mere depositing newspapers in the defendant's name, as editor, at the Stamp Office, under 38 Geo. 3, c. 78, s. 17, that they were published by or came to the knowledge of the defendant.

(*g*) WITNESSES*.

fact in mitigation of damages, which would be evidence, to prove a justification of any part of the libel. He ought to justify as to that part. (*Vessey* v. *Pike*, M. T. 1829, N. P., 3 C. & P. 512). So, in an action for a libel, imputing to the plaintiff, a medical officer of a poor-law union, that he had neglected two pauper patients, the defendant justified that the imputations were true:—Held, that the book in which the plaintiff, under the Poor Law Commissioners, made entries as to the cases of the pauper patients was not admissible in evidence in his favour. (*Meyrick* v. *Wakley*, 1838, N. P., 8 C. & P. 283; S. C. 3 N. & P. 284). A plea of justification to a libel, in which the defendant justifies on the ground that the plaintiff was guilty of bigamy, requires the same strictness of proof as is required on the trial of an indictment for bigamy. If in justifying a libel that the plaintiff was guilty of "polygamy" in marrying three wives, who were all living at the same time, the defendant pleads that the plaintiff was guilty of "polygamy" in marrying three persons named, who were all living at the same time; it is sufficient proof of the marriages to shew the actual marriages as to two, and reputation and cohabitation as to the third, because, if by the term "polygamy" the offence of bigamy is meant, the substance of the issue is made out by proof of the two marriages; and if by the term "polygamy," the mere fact of these marriages is meant, as distinct from the crime of bigamy, evidence of reputation and cohabitation is receivable. (*Willmett* v. *Harmer*, H. T. 1839, N. P., 8 C. & P. 695).

* A vestry clerk who is called as a witness cannot, on the ground that it may criminate himself, object to produce the vestry book, kept under the stat. 58 Geo. 3, c, 69, s. 2. (*Bradshaw* v. *Murphy*, M. T. 1836, N. P., 7 C. & P. 612). In an action for a libel against the printer of a newspaper, one of the proprietors of a newspaper is a competent witness for the defendant, as he is not liable for contribution. (*Moscati* v. *Lawson*, H. T. 1835, N. P., 7 C. & P. 32).

(*h*) Damages.

Blackburn *v.* Blackburn, M. T. 1827. C. P. 4 *Bing.* 395; S. C. 1 *M. & P.* 33; S. C. 3 *C. & P.* 146.

If matter be clearly libellous, malice is immaterial, and the want of it no ground for reducing damages*.

The plaintiff, being about to be chosen preacher at a dissenting chapel, the defendant, in a conversation with one of the congregation, who made inquiry of him respecting the plaintiff's character, related a circumstance which had occurred to him some years before, in such a manner as to induce that person to suppose that the plaintiff had been guilty of forgery. This assertion appearing to be without foundation, the deacons of the chapel sent a circular to each of the congregation, with an account of the affair. The defendant wrote a letter in answer, directed to the minister and deacons, in which he again charged the plaintiff with forgery, and, in support of the charge, set out what purported to be the opinion of counsel on a case submitted, but which was, in fact, only a part of the opinion, certain parts of it being purposely suppressed, they not supporting the defendant's assertion. It was left to the jury to say whether or not the libel imputed forgery to the plaintiff, and whether or not the defendant was actuated by express malice in writing it. They found that the libel did impute forgery, but that the defendant was not actuated by express malice; and accordingly gave a verdict for the plaintiff, damages, 50*l.*

The Court refused to set it aside, or reduce the damages.

Tarpley *v.* Blaby, T. T. 1835. C. P. 7 *C. & P.* 395; S. C. 2 *Bing. N. S.* 437; S. C. 2 *Scott*, 642.

Other libels offered in evidence in mitigation of damages must be shewn to apply clearly to the defendant.

In an action for a libel, papers in the handwriting of the defendant, found in the house of the editor of the newspaper in which the libel was published, held, 1st, to be admissible in evidence, although in part erased, but not qualifying the libel; and 2ndly, where other libels by the plaintiff are offered in mitigation of damages, they must be shewn to clearly apply to the defendant.

* In mitigation of damages, libels published by the plaintiff on the defendant cannot be given in evidence. (*May* v. *Brown*, T. T. 1824, K. B., 3 B. & C. 113; S. C. 4 D. & R. 670). Where a libellous print was inserted in a publication, and referred to in the letter-press:—Held, that the editor and printer were liable for the publication, but that the defendant might shew, in mitigation of damages, other libellous attacks published on the defendant in the plaintiff's works. (*Watts* v. *Fraser*, M. T. 1835, N. P., 7 C. & P. 369; S. C. 2 N. & P. 157; S. C. 1 M. & Rob. 449). In an action for a libel upon a ship, imputing unseaworthiness, the plaintiff may give evidence of special damage, although he had not averred it in his declaration, because a libel upon a chattel is not actionable, unless the owner sustain some damage thereby. Where a libel was published in a newspaper on the 31st of October, and the plaintiff commenced his action on the 4th of November, it was held that, in the estimate of damages, the jury need not confine themselves to the damage which accrued between the publication and the bringing of the action. (*Ingram* v. *Lawson*, M. T. 1838, N. P., 9 C. & P. 326).

(*i*) VERDICT.

(*j*) JUDGMENT. See also, post, p. 541.

CLARKE *v.* TAYLOR, E. T. 1836. C. P. 2 *Bing. N. S.* 654.

Where part is justified and part not justified, which is not the substantive ground of action, the Court refused to order a verdict to be entered for the plaintiff for the latter.

THE defendants imputed in a Manchester newspaper fraudulent and swindling transactions to the plaintiff in that town, and in the publication they also referred to the plaintiff's making some stay (on his journey to Manchester) at Leeds, and his effecting purchases there. In an action for libel the defendants justified as to what was published respecting the plaintiff at Manchester, but were silent as to what was said of his conduct at Leeds. Verdict for the defendants generally. On motion that it should be entered up for the plaintiff as to that part of the publication referring to his conduct at Leeds, which was not justified—

The Court held, that, as the allegations referring to the conduct of the party at Leeds did not clearly appear to be of such a nature as would support an action; and, as those referring to his conduct at Manchester were material, a justification of the latter only was sufficient.

(*k*) COSTS. See 4 & 5 Vict. c. 28, ante, tit. *Costs.*

PRUDHOMME *v.* FRASER, H. T. 1835. K. B. 4 *N. & M.* 512.

Where a count alleges a variety of libels the plaintiff is merely entitled to the costs of those parts of the counts which refer to him*.

IN an action upon the case for a libel, the declaration, containing one count, set out the publication at full length, alleging by innuendos the whole to be intended to apply to the plaintiff. The jury found a very small portion of the publication to have been intended to apply to the plaintiff, and expressly negatived the innuendos contained in the other parts:—Held, that, although the plaintiff was entitled to the verdict, the defendant was entitled to the costs of that part of the declaration and the issues raised thereon by the plea of not guilty, the innuendos contained in which the jury had negatived.

SIMPSON *v.* HURDIS, M. T. 1836. Ex. 5 *D. P. C.* 304; S. C. 2 *M. & W.* 84.

Pleas, general issue and two special pleas; verdict for plaintiff, damages 1*s.*; the Judge certified to deprive the plaintiff of

THIS was an action for libel, to which the defendant pleaded, first, the general issue; secondly, a justification; thirdly, that it was a privileged communication. At the trial before *Gurney*, B., the jury found a verdict for the plaintiff on all the issues, damages 1*s.*, and the Judge certified under the 43 Eliz., c. 6, s. 2, whereupon the Master refused to allow the plaintiff costs. On motion for a review of the taxation, by Reg. Gen. Hil. T., 4 Will. 4, No. 7, the defend-

* Where a plaintiff succeeds on one of several issues and the defendant succeeds on the others, but the defendant's witnesses are as necessary on the issues found against him as on the issues found for him; the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him and the defendant to none of his. (*Richards* v. *Cohen*, H. T. 1833, B. C., 1 D. P. C. 533). Taxation directed to be reviewed where two only of eight witnesses were examined, and some subpœnaed to prove facts stated in the libel (the ground of action), and assumed to be true and unnecessary to be proved. (*Bagnall* v. *Underwood*, 11 Price, 510).

ant not proceeding upon the special pleas; and, it appearing that as they were unnecessary, the plaintiff ought to have been allowed his costs on those issues—

The Court held, that the certificate operated to deprive the plaintiff of all the costs. *Parke*, B., that rule is subservient to the statute; the Master was right.

costs:—Held, that Rule, H. T. 4 Will. 4, made no alteration.

EMPSON *v.* FAIRFAX, T. T. 1838. K. B. 3 *N. & P.* 385.

THIS was an action of libel, to which the defendants pleaded two pleas, not guilty and a justification, on which issue was joined. The jury found a verdict for the defendants on the first issue upon the ground that the publication was not a libel. No evidence was offered in support of the justification, and the jury found a verdict for the plaintiff thereon. The defendants obtained the record, and prepared the postea, alleging that the jury found for the defendants on the first issue, but were discharged by consent on both sides from giving any verdict on the second issue.

The Court held, that the defendants were not justified in stating on the postea that the jury were discharged from finding any verdict on the second issue, and that the plaintiff was entitled to the verdict and costs on the second issue.

Under pleas of not guilty and justification, the defendant recovered on the first plea but gave no evidence on the second:—Held, the plaintiff was entitled to the costs of that issue.

FORBES *v.* GREGORY, H. T. 1833. Ex. 1 *C. & M.* 435; S. C. 1 *D. P. C.* 679; S. C. 3 *Tyrw.* 385.

ON motion to set aside the taxation of costs, it appeared that some defendants demurred to some of the counts of a declaration, and the other defendants went to issue upon them, and all the defendants went to issue upon the other counts, and those defendants who demurred got judgment upon the demurrer before the issues were tried. It was contended that these defendants were not entitled to costs under the 8 & 9 Will. 3, c. 11, s. 2, and *Astley* v. *Young*, (2 Burr. 1232), recognised in *Parton* v. *Stanning*, (5 East, 261), was relied on; and it was contended that the action did not apply to actions on the case, and that they were at all events premature until a nolle prosequi had been entered.

The Court made the rule absolute.

Where there are several defendants, some demur and others plead, those who have judgment on demurrer cannot tax their costs on that judgment.

(*l*) INQUIRY, WRIT OF*.

(*m*) NEW TRIAL.

LEVY *v.* MILNE, E.T. 1827. C. P. 12 *Moore*, 418; S.C. 4 *Bing.* 195.

IN an action for a libel, which consisted of verses ridiculing the plaintiff in his calling of a sheriff's officer, the Judge told the jury that the composition being calculated to render the plaintiff ridiculous and to occasion pain to his feelings, was libellous. The jury

If the jury ask the Judge if 1*s.* will carry costs, and he replies in the affirm-

* The Court will not, at the instance of a sheriff, stay the execution of a writ of inquiry, on a judgment by default in an action for a libel, on the ground that the House of Commons has voted the libel to be a privileged publication; and that all persons concerned in bringing any action in respect of such publication are guilty of a breach of the privileges of that House. (*Stockdale* v. *Hansard*, M. T. 1839, B. C., 8 D. P. C. 148).

ative, a new trial will be granted.

asked the Judge if 1*s.* damages would carry costs; he replied in the affirmative.

Per Cur.—There must be a new trial. Juries have no right to set themselves up against the opinion of the Judge in matters of legal construction. In this case the jury have not only given a verdict against the law, but they have given it against their own conviction, as evidently appears from their having asked if 1*s.* would carry costs.

(*n*) REPLEADER.

GOODBOURE *v.* BOWMAN. 9 *Bing.* 532; S. C. 2 *M. & Scott*, 700.

A repleader will not be awarded unless complete justice cannot be effected.

THIS was an action for a libel against a party formerly mayor of B., charging, in substance, that he had in two mayoralties bought coals at 6*d.* a bushel, and charged them at 4*d.* to the poor and 4*d.* to the corporation, pocketing 2*d.* per bushel. Plea, that plaintiff did so in his first mayoralty; and that, in his second mayoralty, he charged 3*d.* to the poor and 3*d.* to the corporation.

The Court held it bad, the libel imputing the same double charge of 4*d.* to each in each mayoralty:—Held, also, that, as taking together the whole of the respective allegations in the several pleas, they fully amounted to a confession of the cause of action, no repleader ought to be awarded, which will only be allowed when otherwise complete justice could not be effected.

VII. RELATIVE TO INDICTMENTS FOR.

REX *v.* AMPHILT, E. T. 1825. K. B. 4 *B. & C.* 35.

A copy of the newspaper, delivered at the Stamp Office, is evidence of the libel*.

ON an indictment against the proprietor of a newspaper for a libel, the only proof of publication was the delivery of a copy of the newspaper containing the libel to the officer at the Stamp Office. It was objected, that this was no evidence of an unlawful publication.

The Court were clearly of opinion that this was sufficient evidence of a publication.

VIII. RELATIVE TO CRIMINAL INFORMATIONS FOR.

REX *v.* JOLLIE, E. T. 1833. K. B. 1 *N. & M.* 483.

The criminal information

ON motion for a criminal information—

The Court held, a party aggrieved by a libel has to the second

* In an indictment for a libel, the proprietor of a newspaper is primâ facie answerable for what appears in it; but the presumption arising from proprietorship may be rebutted, and an exemption established. (*Rex* v. *Gutch*, M. T. 1829, N. P., 1 M. & M. 433). Where an indictment charged the publishing a libel with intent to defame certain parties, and also to bring the administration of justice into contempt:—Held, that the jury were bound to convict, if they were of opinion that the defendant published the libel with either of those intentions. (*Rex* v. *Evans*, 1820, N. P., 3 Stark. 35). If a prosecutor, having removed an indictment by certiorari, give notice of trial for the assizes, and bring down the record, and withdraw it after it has been entered for trial, the Judge at the assizes cannot order the prosecutor to pay the defendant the costs of the day, but a motion must be made in the Court of King's Bench. (*Rex* v. *Watson*, 1830, N. P., 4 C. & P. 229).

term after knowledge of the publication within which to move for a criminal information; but the application must be made in the second term in such time as to allow the defendants a reasonable time, under the circumstances, to shew cause within that term.

should be moved for within two terms*.

REX *v.* EVE AND PARLBY, M. T. 1836. K. B. 1 *N. & P.* 229.

AN application for a criminal information for a libel had been discharged on an affidavit that the libel was true, and the deponent subsequently indicted for perjury thereon, but absconded.

The Court, reluctantly acting on a suggestion of the former affidavits being untrue, under the circumstances made a second rule for the information absolute.

Under circumstances, the Court granted a second rule for a criminal information.

REG. *v.* WOOLMER, T. T. 1840. Q. B. 4 *P. & D.* 137.

THE rule for a criminal information was granted on the production of a newspaper corresponding with the certified copy of a declaration made at the Stamp Office by the defendant, as publisher, under the 6 & 7 Will. 4, c. 76, s. 8; but the paper was not annexed to the affidavit on which the rule was moved, nor made an exhibit, nor the rule drawn up on reading it.

The Court held, that, on the objection being taken, although according to the usual practice, the rule could not be made absolute.

The certified copy of the newspaper must be annexed to the affidavit.

REX *v.* BRADLEY, E. T. 1828. K. B. 2 *M. & Ry.* 152.

ON an information for a libel, the defendant was found guilty, and, being brought up for judgment, spoke in person in mitigation

The truth of a libel cannot be

* On motion for criminal information, the rule at N. P., that, after production and proof of the affidavit from the Stamp Office, a paper corresponding with it may be put in and read as published by the parties named there, applies. (*Rex* v. *Donnison*, H. T. 1833, K. B., 4 B. & Ad. 698). In an information for a libel, imputing improper conduct to A., as town-clerk of H., it was alleged that he was town-clerk, and that it was his duty to issue his precept for summoning the grand jury. The precept was signed both by the mayor and town-clerk:—Held, that this satisfied the allegation, that he issued his precept, and that the fact that he was an alderman of the borough at the time when he was elected town-clerk made no difference. (*Rex* v. *Hatfield*, 1830, N. P., 4 C. & P. 244). A widow lady being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and desiring a diligent and extensive inquiry into the plaintiff's character:—Held, that this was a letter written on a justifiable occasion, and that the defendant was justified in writing the letter, provided the jury be satisfied that, in writing it, the defendant acted bonâ fide, although the imputations contained in the letter were false, or based upon the most erroneous information; and that, if the defendant used expressions, however harsh, hasty, or untrue, yet bonâ fide, and believing them to be true, he was justified in so doing. Communications of this kind should be viewed liberally by juries; and unless they see clearly that there was a malicious intention of defaming the plaintiff, they ought to find for the defendant. (*Todd* v. *Hawkins*, 1837, N. P., 8 C. & P. 88; S. C. 2 M. & Rob. 20). An information for a libel stated that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard, it was asked if the prosecutor had not received certain warning; the prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard, if he had not received the letters:—Held, that the letters might be received in evidence, as explanatory of the placard, without proof of the handwriting of them. (*Rex* v. *Slaney*, H. T. 1832, N. P., 5 C. & P. 213).

urged when the defendant is brought up for judgment;

of punishment, and, having gone into much irrelevant matter, was ordered by the Court to argue upon the ground of his having been in error in making the charge against the prosecutor, saying, that they could not allow him to urge the truth of the charge.

REX *v.* HALPIN, H. T. 1829. K. B. 9 *B. & C.* 65.

nor can affidavits to that effect be used.

THE defendant was indicted for a libel upon a private individual, imputing to him conduct which deeply affected his character, and insinuating that he had been guilty of an unnatural offence. The defendant having been convicted was brought up for judgment.

The Court held, 1st, where a libel charges a person with having committed an indictable offence, the defendant, upon being brought up for judgment for publishing that libel, is not at liberty, in mitigation of punishment, to shew, upon affidavits, that the person was guilty of the offence, except by shewing a record of his conviction; 2ndly, but the defendant in such a case is at liberty to shew, upon affidavit, that he published the libel believing the statement to be true, and to shew what were the reasons operating upon his mind at the time which induced him so to believe.

License.

See tits. *Ale and Alehouse—Composition with Creditors—Frauds, Statute of—Insurance—Nuisance—Trespass—Ways.*

BRIDGES *v.* BLANCHARD, T. T. 1834. K. B. 3 *N. & M.* 691; S. C. 1 *Ad. & E.* 536.

A license must be clear and explicit;

A PAROL license was given "to place a ladder on the plaintiff's grounds" in the terms of the request, although implying an intention of opening a window overlooking the plaintiff's premises—

The Court held, that it did not amount to a license to make the window: such consent to be binding ought to be clear and explicit.

WALLIS *v.* HARRISON, T. T. 1839. Ex. 4 *M. & W.* 538.

but may be countermanded whilst executory.

IN trespass, it appeared there was a parol license from A. to B. to enjoy an easement over A.'s land—

The Court held, it was countermandable at any time whilst it remains executory; and if A. conveys the land to another, the license is determined at once, and without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land.

WOOD *v.* MANLEY, M. T. 1839. Q. B. 3 *P. & D.* 5.

Goods sold at an auction on condition to remain on the premises till wanted, is an irrevocable license.

A SALE of the plaintiff's goods had taken place under a distress, and it was part of the conditions of sale, to which the plaintiff assented, that the purchasers might leave the articles purchased by them on the premises until a certain day, and enter in the meantime to remove them when they thought proper; the defendant having purchased goods, and left them accordingly—

The Court held, that this amounted to an irrevocable license from

the plaintiff, and was a justification on the plea of leave and license to trespass for breaking and entering a close to carry them away.

BROWN *v.* DUNCAN, M. T. 1829. K. B. 10 *B. & C.* 93.

Formerly the want of a license was no answer to an action on a contract*;

THE plaintiffs, five in number, carrying on the business of distillers, sued the defendant on a guarantee of the price of spirits supplied to another party, and it appeared that one of the plaintiffs, not named in the license as distillers, carried on the business of a retailer of spirits, within the limits prohibited by the excise acts.

The Court held, that the statutes only being to protect the revenue, the plaintiffs were not precluded from recovering the value of the spirits sold, by reason of their having violated the excise laws.

COPE *v.* ROWLANDS, M. T. 1836. Ex. 2 *M. & W.* 149.

but now a different rule obtains.

ASSUMPSIT for work and labour, as defendant's agent, and for commission due to the plaintiff from the defendant. The third plea was, that the work and labour was done, performed, and bestowed by the plaintiff within the city of London, as a broker, to wit, as a stock-broker, in and about the purchasing and selling for and on account of the defendant, and bargaining for and on account of the defendant, for interests and shares in public stocks, &c., and that the commission in the declaration mentioned is commission claimed by the plaintiff in respect of such work and labour as a broker, and that the plaintiff was not at the time of performing the work a broker duly licensed, authorized, or empowered to act or practise as a broker in the premises within the city of London. Replication de injuriâ. The defendant having recovered a verdict on this plea, on motion for judgment non obstante veredicto—

Per Cur.—It is perfectly settled that where the contract, which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by the statute, though the statute inflict a penalty only, because such a penalty implies a prohibition; and it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue, or any other object. The plea was, that the work and labour, in respect of which the action was brought, was performed by the plaintiff, as a stock-broker, in London, and that he was not licensed, authorized, and empowered to act as a broker by the court of mayor and aldermen pursuant to the statute; we are of opinion that the plea is good in substance, and consequently the rule must be discharged.

* So, where a brewer delivers beer, to be used in a particular public-house, he cannot make any person, except the licensed keeper of the house, primarily liable for it, so as to maintain an action for goods sold and delivered against him. (*Meux* v. *Humphries*, M. T. 1827, N. P., 1 M. & M. 132; semble, contra, *Brooker* v. *Wood*, H. T. 1834, K. B., 3 N. & M. 96; S. C. 5 B. & Ad. 1052).

Lien.

See *Stoppage in Transitu.*

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II. RELATIVE TO BY WHOM ACQUIRED.

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(*b*) BANKERS, p. 546.

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I. RELATIVE TO THE CASES IN WHICH A LIEN MAY OR MAY NOT BE ACQUIRED.

SANDERSON *v.* BELL, M. T. 1834. Ex. 2 *C. & M.* 304.

To sustain a lien there must be something done to the article on which it is claimed.

A MORTGAGE deed was delivered to A., an auctioneer, for the purpose of obtaining payment of the principal and interest due thereon from the mortgagor, and A. made several applications for that purpose; he then claimed a lien on the deed for his charges.

Per Cur.—The distinction is, where any work is to be done on the chattel to improve or to increase its value, the lien attaches; but where it is merely delivered, as in this case, to make a demand upon it, no such right can be supported.

TANSLEY *v.* TURNER, T. T. 1835. C. P. 2 *Bing. N. S.* 151.

Where everything to be done has been done on the bankruptcy of the

A. SOLD to B. all the ash trees which were lying on C.'s land, where they had grown, and had been felled, at 4*s.* 7½*d.* per foot cube, on credit. Some trees were measured and taken away; then all the residue were marked, and the length and girth of each tree

were taken; but the total cubic contents of the trees were not ascertained on the bankruptcy of the purchaser.

The Court held, that, as nothing remained to be done but the adding together of the different measurements, the property passed to the purchaser.

purchaser, the vendor has no lien*.

CUMPSTON *v.* HAIGH, H. T. 1836. C. P. 2 *Bing. N. S.* 449; S. C. 2 *Scott*, 684.

THE defendants, carrying on a scribbling and fulling-mill, stipulated that all goods on hand should be liable to a lien for the general balance, and had received oil and drying materials from the plaintiff, which were kept in a room for all customers who had access thereto, but were under the lock and key of the defendants every night.

The Court held, that the words, "goods on hand," did not apply to articles used in the progress of being manufactured and deposited there, on which the labour of the defendants' mill was not employed.

Under the words, "goods on hand," the right of lien only applies to those in the progress of manufacture.

II. RELATIVE TO BY WHOM ACQUIRED.

(*a*) AGISTER OF CATTLE.

JACKSON *v.* CUMMINGS, T. T. 1839. Ex. 5 *M. & W.* 342.

TRESPASS quare clausum fregit, and taking away certain cows. Pleas, first, not guilty; second, that the cows had been agisted by the defendant, and that he had a lien upon them for fees by law and by agreement with the plaintiff, and that the plaintiff wrongfully took them away from the defendant's close, and placed them in the locus in quo, without paying the sum due for agistment, whereupon he, defendant, peaceably entered and retook them.

At common law, an agister of cattle has no lien.

Per Cur.—The general rule of law is, that, without any express agreement between the parties, wherever one of them has expended skill and labour in the improvement of a chattel, he is entitled by law to a lien upon it. This was so laid down in *Bevan* v. *Waters*, (M. & M. 235), and recognised in *Scarfe* v. *Morgan*, (4 M. & W. 270); but, if we consider the matter, we shall see that the case of agistment does not fall within this principle, because the bailee

* If a person is stopped with a horse under suspicious circumstances, and the horse be placed at an inn by the police, the innkeeper has no lien on the horse for its keep: he is liable to be sued in trover by the owner of the horse. (*Binns* v. *Pigot*, T. T. 1840, N. P., 9 C. & P. 208). So, where A. put a phaeton into the possession of M. for him to paint it, and paid M. beforehand for the painting, M. never painted it, but placed it on the premises of B., where it stood three months:—Held, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. had placed it there by the authority of A. (*Buxton* v. *Baughan*, M. T. 1834, N. P., 6 C. & P. 674). But where A. applied to B., (the proprietor of a house, with cellars, which he was in the habit of letting), telling him that he wanted cellar room to do a pipe of wine, but adding that he did not know but very shortly he might want a good deal of room; B., upon this, said that he had better put it into his (B.'s) own cellar, which he did:—Held, that, under these circumstances, B. was entitled to detain the wine till a reasonable and proper sum had been paid him for rent. (*Gray* v. *Chamberlain*, H. T. 1830, N. P., 4 C. & P. 260).

in such a case does not communicate value to the chattel, either by himself or by any instrument; then, there is an express authority from Cro. Car., (*Chapman* v. *Allen*), that an agister has no lien.

(*b*) Bankers*. See ante, tit. *Banker.*

(*c*) By the Crown.

In re Day, T. T. 1824. Ex. 1 *M'Clell.* 384.

The lien of the Crown on stage coaches for duties attaches, though passed to assignees.

Under the 3 Geo. 4, c. 95, s. 10, giving to the Crown a lien on coaches, horses, &c., in respect of duties accruing thereon—

The Court held, that such lien attached although the property had passed to assignees, but that it did not extend beyond the particular duties due on each coach &c., and consequently not on the general stock of the party.

(*d*) Stable-keepers and others connected with horses. See also, post, p. 548, n.

Judson *v.* Etheridge, T. T. 1833. Ex. 1 *C. & M.* 743; S. C. 3 *Tyrw.* 954.

A stable-keeper as such has not a lien†;

In trover for a horse; plea, that he was delivered to the defendant to be stabled and kept and taken care of.

The Court held, that such a bailee could not detain the horse, as a stable-keeper as such had no lien.

Scarfe *v.* Morgan, T. T. 1838. Ex. 4 *M. & W.* 270.

but the owner of a stallion has a lien on a mare sent to be covered.

In trover for a mare, it appeared that she had been sent to be covered, and the defendant claimed, besides 11*s.*, the usual charge, a further sum for similar claims; and, on demand, refused to deliver the mare unless the whole lien was satisfied; but the plaintiff made no tender of the 11*s.*

The Court held, 1st, that the charge in respect of such benefit to the plaintiff's mare was within the principle on which a specific lien would arise; 2ndly, that the claim of lien in respect of the several sums not maintainable did not amount to a waiver of the lien in respect of the one for which the right did exist.

(*e*) Warehouse-keepers‡.

* A banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer which may come to his hands, and may put the same in suit. (*Bolland* v. *Bygrave*, T. T. 1825, N. P., 1 Ry. & M. 271).

† But a livery stable-keeper has a lien for the keep and exercise of a horse sent to him for the purpose of being trained. (*Bevan* v. *Waters*, T. T. 1828, N. P., 1 M. & M. 235; S. C. 3 C. & P. 520).

‡ Whether, by the custom of trade in London, whoever the person may be who houses goods with an up-town warehouse-keeper, the warehouse-keeper has

(*f*) Wharfinger.

Holderness *v.* **Collinson**, T. T. 1827. K. B. 7 *B. & C.* 212; S. C. 1 *M. & Ry.* 55.

A wharfinger of Hull claimed a right to retain the goods of a bankrupt against his assignees, for a general balance in respect of wharfage, labourage, and rent; and it appeared that in the course of business in the town of Hull, the claim for the last two items under similar circumstances had in some instances been disputed, although in the greater number it had been acquiesced in.

It seems a wharfinger has no general lien.

The Court held that the usage was not established; and that, by common law, a wharfinger has no general lien upon goods in his possession for the charges termed labourage and rent; but, if he set up such a claim, must establish it by proof of general and notorious usage, so as to raise an implied contract, or special agreement, with the customer againstwhose goods that claim is made.

III. RELATIVE TO THE RIGHTS OF PARTY CLAIMING.

Donatty *v.* **Crowther**, T. T. 1826. C. P. 11 *Moore*, 479.

In this case it appeared that it had been agreed by the owner that a mare should remain with the livery stable-keeper as a security for monies advanced, and for her keep, with a power of sale, if not otherwise liquidated.

A party having a lien may maintain trover against the sheriff for taking it under an execution*.

The Court held, that he had a lien upon her, so as to be entitled to maintain trover against the sheriff taking her under an execution against the owner.

IV. RELATIVE TO THE DETERMINATION OF.

Hewison *v.* **Guthrie**, E. T. 1836. C. P. 2 *Bing. N. S.* 755.

In trover for a policy of insurance; plea, retainer, as a lien for a general balance due to the defendant as an insurance broker; replication, a bill given and accepted as payment for such balance, and not due at the time of the conversion.

A lien is waived by taking a bill;

The Court held, that the lien being gone, the plaintiff could not, without having specially pleaded it, rely on the defence, and that the right to detain the policy ceased to exist upon taking the bill in payment.

a right to detain them for all that is due from such person in respect of charges for goods previously deposited by such person, quære? But it seems that such a custom would not be unreasonable. (*Leuckart* v. *Cooper*, T. T. 1835, N. P., 7 C. & P. 119; S. C. 1 Scott, 481; S. C. 1 Bing. N. S. 509).

* A party having a lien on the goods, coupled with an exclusive possession, might in law be enabled to maintain trespass pro bonis asportatis. (*Symons* v. *Hearson*, E. T. 1833, Ex., 12 Price, 369). So, if a person having a lien on goods wrongfully parts with them, the owner's right to the possession revives, and he may maintain trover for them. (*Scott* v. *Newington*, H. T. 1833, N. P., 1 M. & Rob. 252).

JACOBS *v.* LATOUR, E. T. 1828. C. P. 5 *Bing.* 130; S. C. 2 *M. & P.* 201.

and where a party having a lien seizes the goods in execution, he loses his lien.

A STABLE-KEEPER and trainer having sent horses for training, and claiming a lien thereon, obtained a judgment from his employer, and took the horses in execution.

The Court held, that, as the sheriff must have had possession delivered to him by the judgment creditor, the lien was thereby destroyed.

V. RELATIVE TO THE REVIVAL OF.

DIXON *v.* YATES, T. T. 1833. K. B. 2 *N. & M.* 177; S. C. 5 *B. & Ad.* 313.

If bills be dishonoured before the articles are parted with, the lien revives.

W., AN importer and warehouseman, sold rums to D. & Co. on credit, to whom an invoice was made out, and the price afterwards paid by them, and they afterwards sold them to C., for which bills of exchange were given, but no delivery order taken by C., nor the goods removed from the custody of W. The bills were eventually dishonoured; and the acts of possession being equivocal—

The Court held, that the lien of D. revived, and was not affected by a re-sale of the goods by C.

BUNNEY *v.* POYNTZ, H. T. 1833. K. B. 1 *N. & M.* 229.

In a prior case it was held, that, upon the dishonour of bills or notes, the lien did not revive.

THE defendant employed an agent to sell a certain quantity of hay in a stack, which he did to one C. S., and took his promissory note, payable at three months to the agent himself, for the price. The agent immediately discounted the note with the plaintiffs, his bankers. The purchaser, at several times within the three months, carried away several tons of the hay, and afterwards sold the remainder to the plaintiffs, allowing the note given by him to the agent to be taken as part payment, and receiving a further sum. The agent afterwards became bankrupt; and, upon demand being made by the plaintiffs, (after the three months had elapsed), to be allowed to take away the rest of the hay, the defendant refused. In an action of trover for the hay—

The Court held, 1st, that the fact of part having been delivered did not take away the defendant's lien; but 2ndly, that the defendant could not be considered as an unpaid vendor, so as to revive the right of lien upon the expiration of the term for which the note was to run.

VI. RELATIVE TO RE-TAKING*.

* A livery stable-keeper may, by express agreement, have a lien for the keep of horses. Where the owner of horses in the possession of a livery stable-keeper who had such lien fraudulently took them out of his possession:—Held, that the livery stable keeper might without force retake the horses, and that the lien would revive. (*Wallace* v. *Woodgate*, M. T. 1824, N. P., 1 Ry. & M. 193; S. C. 1 C. & P. 575).

VII. RELATIVE TO PROCEEDINGS CONNECTED WITH.

GREEN *v.* BUTTON, M. T. 1835. Ex. 2 *C., M. & R.* 707; S. C. 1 *T. & G.* 118.

Case lies against a party who falsely represents that he has a lien.

IN an action on the case for a false and malicious representation, that defendant was entitled to a lien on certain goods agreed to be sold to the plaintiff by a third party, whereby the seller was induced to believe that the defendant had such lien, and refused to deliver the goods to the plaintiff, whereby plaintiff was prevented using them in his business and certain works were delayed, &c.—

The Court held, that it sufficiently appeared on the declaration that the defendant knowingly made such false claim; and that the special damage was one sufficiently resulting from the non-delivery of the goods in consequence of such false representation.

MARKS *v.* LAHEE, H. T. 1837. C. P. 3 *Bing. N. S.* 408; S. C. 4 *Scott*, 137.

The sum tendered may be traversed as being insufficient.

IN trover for plates, etchings, and engravings; plea, that they were detained upon an agreement as a security for a sum due from plaintiff. On an issue as to the sufficiency of the sum tendered in discharge of the lien—

The Court held, that the amount of the sum tendered was a material fact to be traversed, and was not the less material by being laid under a videlicet.

PINNOCK *v.* HARRISON, M. T. 1837. Ex. 3 *M. & W.* 532.

But, upon a plea of lien there can be no set-off unless agreed*.

IN trover for certain axle-trees and iron-work; plea, that they were delivered to the defendant for the purpose of being wrought and repaired by the defendant in his trade of coach-maker, and claiming a lien thereon for the work done, to which the plaintiff replied de injuriâ—

The Court held, that the plaintiff could not set up a claim to a set-off to a larger amount against the defendant's demand, unless an agreement were shewn that the one demand should be set off against the other.

MARKS *v.* LAHEE, H. T. 1837. C. P. 3 *Bing. N. S.* 408; S. C. 4 *Scott*, 137.

Plea of lien; replication, that there were several distinct contracts; rejoinder, denying there were such contracts; —Held, a material issue.

IN trover for certain etchings, impressions, pictures, and prints, on which the defendant claimed a general lien for work and labour, the plaintiffs, in their replication, alleged that the etchings, impressions, pictures, &c. were impressed and printed from divers plates delivered for that purpose to the defendant, and that the defendant was retained and employed to impress and imprint under separate and distinct contracts and agreements. The defendant, in his rejoinder, merely denied that he was employed and retained under

* In an action of trover for wool, a defendant may plead, since Reg. 5, H. T. 4 Will. 4, 1st, the general issue; 2nd, a lien by custom; 3rd, a lien by agreement; 4th, a lien by custom, with a statement, that the wool was deposited by one having a primâ facie title to it; and 5th, a lien by custom, with a statement, that the wool was deposited with the defendant by the plaintiff's agent. (*Leuckart v. Cooper*, T. T. 1835, C. P., 1 Scott, 481; 1 Bing. N. S. 509; 7 C. & P. 119).

certain distinct and separate agreements and contracts. Upon issue joined and verdict for the plaintiffs—

The Court held, that the replication did not tender an immaterial issue, and consequently that a repleader should not be awarded.

Lights.

See 3 & 4 Will. 4, c. 71.

BLANCHARD *v.* BRIDGES, M. T. 1835. K. B. 5 *N. & M.* 567; S. C. 3 *N. & M.* 691; S. C. 1 *Ad. & E.* 536.

Newly erected windows may be obstructed in the absence of an acquiescence for twenty years or a license*.

THIS was an action on the case for obstructing windows. It appeared that, in 1816, the land whereon the plaintiff's windows were had been conveyed as a parcel of arable land, and it was two or three years after sold to a party who built a cottage thereon; having entered without any conveyance, he afterwards contracted to sell it, and the vendee obtained from the owner of the adjoining land a few feet additional on one side of the cottage, and a conveyance of the entire premises was, in 1822, made by all proper parties, and the purchaser carried out his building to the extremity of the land, and inserted a window at one end, and substituted, where there had before been only a passage, windows at the other end, not in the same places, but in the same direction as before.

The Court held, that there not being acquiescence of twenty years, there was nothing in the grant made by the owner of the adjoining lands which could be converted into a license, or preclude him from building on his own land, although, in so doing, he obstructed the newly-erected window.

FLIGHT *v.* THOMAS, H. T. 1840. Q. B. 11 *Ad. & E.* 590; S. C. 3 *P. & D.* 442.

Under 3 & 4 Will. 4, c. 71, a few days short of twenty years will suffice.

THE plaintiff had enjoyed the easement (a window) for a few days short of twenty years, when the defendant erected the obstruction, and within a few months the plaintiff brought the action.

The Court held, that, upon the construction of ss. 3 and 4 of 2 & 3 Will. 4, c. 71 (prescription), the plaintiff was entitled to recover, there having been no interruption acquiesced in for a year to prevent the period of twenty years' enjoyment taking effect.

* A., the owner of two adjoining houses, grants a lease of one of them to B.; he afterwards leased the other to C., there then existing in it certain windows. After this, B. accepts a new lease of his house from A.:—Held, that B. cannot alter his tenement so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows are not twenty years old at the time of the alteration. (*Coutts* v. *Gorham*, T. T. 1829, N. P., 1 M. & M. 396). The custom of London, which allows a man to build to any height upon ancient foundations, although he may darken his neighbour's lights thereby, must be confined to cases where all the four walls of the building belong to the party, and will not justify him in raising an obstruction by means of three walls of his so as to darken the lights in a fourth wall belonging to his neighbour. (*Shadwell* v. *Hutchinson*, E. T. 1829, N. P., 3 C. & P. 615). The use of an open space of ground in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land, so as to obstruct the light and air. (*Roberts* v. *Macord*, M. T. 1832, N. P., 1 M. & Rob. 230).

SWANSBOROUGH *v.* COVENTRY, H. T. 1833. C. P. 9 *Bing.* 305; S. C. 2 *M. & Scott*, 362.

A party who purchases premises has the same right as to lights as his vendor had.

THE plaintiff purchased premises adjoining the site of a building of one story, lately before pulled down, and whereon the defendant, who had become purchaser thereof, erected new premises, obstructing the ancient lights in the upper part of the plaintiff's premises—

The Court held, that, as the vendor under whom the defendant claimed could not derogate from his grant to the plaintiff, the defendant could not build on the land purchased by him so as to obstruct the plaintiff's lights, notwithstanding that, in the description of the premises of the plaintiff at the time of sale, it was stated to be adjoining to building ground; that being consistent with a building not interfering with the rights at the time belonging to the plaintiff's premises.

SHADWELL *v.* HUTCHINSON, H. T. 1831. K. B. 2 *B. & Ad.* 97.

If an erection* obstructing window lights be continued, another action may be maintained, notwithstanding the former recovery.

THE plaintiff had brought an action against the defendant for obstructing the ancient window of the plaintiff's house, in the occupation of his tenant, to the injury of the plaintiff's reversionary interest. In that action the plaintiff recovered nominal damages. The obstruction being continued, the plaintiff brought this action to recover damages for continuing it, and recovered 100*l.* damages.

The Court held that the continuance gave a fresh cause of action.

Limitation of Estates. See tit. *Will.*

Limitation of Actions and Legal Proceedings.

I. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS THE CAUSE OF ACTION. See, also, particular heads, according to the subject-matter.

(*a*) ACCOUNTS, p. 553.
(*b*) BILLS AND NOTES, p. 553.
(*c*) CONTRIBUTION, p. 554.
(*d*) GOODS, p. 554.
(*e*) INDEMNITY, p. 554.
(*f*) NEGLIGENCE, p. 554.
(*g*) RENT-CHARGE AND ANNUITIES, p. 555.

* In an action of trespass for removing boards, on a plea of justification, that they obstructed an ancient window through which the light ought to pass, it is sufficient to shew that the window was one through which the light ought to be allowed to pass, though the window is proved to have been erected within living memory. (*Penwarden* v. *Ching*, 1829, N. P., 1 M. & M. 400).

II. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS THE FORM OF ACTION. See, also, particular forms of action.

(*a*) PERSONAL ACTIONS, p. 555.

(*b*) REAL ACTIONS, p. 556.

III. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS PARTICULAR PERSONS, p. 558. See, also, particular heads.

IV. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS PARTICULAR STATUTES, p. 559.

V. RELATIVE TO HOW THE OPERATION OF THE STATUTE MAY BE AVOIDED.

(*a*) BY ACKNOWLEDGMENT.

1. *Before* 9 *Geo.* 4, *c.* 14, p. 560.

2. *Since the* 9 *Geo.* 4, *c.* 14.

1.—*Construction of the* 9 *Geo.* 4, *c.* 14, p. 562.

2.—*Of the Memorandum*, p. 562.

3.—*Conditional Acknowledgment*, p. 565.

4.—*By Part Payment, or Payment of Interest*, p. 566.

5.—*By Delivery of Goods, or Arrears of Rent*, p. 568.

6.—*By and to particular Persons*, p. 569.

7.—*By One of several Joint-Contractors*, p. 569.

8.—*By new Contracts*, p. 571.

9.—*Evidence of*, p. 572.

(*b*) BEING ABROAD, p. 573.

(*c*) BY PROCESS, p. 574.

VI. RELATIVE TO THE EFFECT OF, AS REGARDS THE DEBTOR, p. 575.

VII. RELATIVE TO PLEADINGS CONNECTED WITH.

(*a*) DECLARATION, p. 575.

(*b*) PLEA, p. 576.

(*c*) REPLICATION, p. 577.

VIII. RELATIVE TO EVIDENCE, p. 577.

IX. RELATIVE TO WITNESSES, p. 577.

X. RELATIVE TO SCOTLAND AND FOREIGN COUNTRIES, p. 578.

I. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS THE CAUSE OF ACTION.

(*a*) Accounts.

Mills *v.* Folkes, E. T. 1839. C. P. 5 *Bing. N. S.* 455.

Accounts merely open,

By an order of *Tindal*, C. J., and by consent of the parties, this cause was referred to the arbitration of a barrister, who was empowered to raise any points, by a special finding of the facts upon the face of the award, for the opinion of the Court, and the Court to have the power of drawing any inference from the facts that a jury might find.

The Court held, 1st, accounts merely open between parties, in acknowledgment of which there is neither writing nor any part payment, are within the Statute of Limitations, and an action is not maintainable upon them, if the statute be pleaded. To take a case out of the Statute of Limitations by part payment, the circumstances must be such as to shew that the payment made should be appropriated to the part discharge of the principal or interest of the particular debt.

Rothery *v.* Munnings, T. T. 1830. K. B. 1 *B. & Ad.* 15.

or a mere accidental transaction within the six years, is not sufficient to take the former part of the account out of the statute*.

To an action on a proctor's bill, the defendant pleaded the Statute of Limitations. It appeared that the whole of the items of the plaintiff's bill, as a proctor in a suit terminated by a sentence, were incurred more than six years, but two items were added within that period, for perusing a letter from the adverse proctor, as to the costs being paid, and threatening proceedings against the bail, and for attending him thereon.

The Court held, that as the latter subject was only accidental, and not connected with the former duty of the plaintiff, the statute was a bar to the original demand, and he could only recover for the last items.

(*b*) Bills and notes.

Thorpe *v.* Coombe, E. T. 1826. K. B. 8 *D. & R.* 347.

If a note be payable "after" demand, the statute runs from the demand†.

To an action on a promissory note, payable two years after demand, plea, the Statute of Limitations.

Per Cur.—The statute does not to begin to run on a promissory note, payable two years after demand, until two years after demand made.

* If goods are supplied by A. to B., and five years afterwards there are mutual dealings between the parties, quære whether the first item comes within the exception of merchants' accounts in the Statute of Limitations? (*Moore* v. *Strong*, E. T. 1835, C. P., 1 Scott, 367; S. C. 1 Bing. N. S. 441).

† Where a bill, dated March 12, 1813, payable "twenty-four months after demand," was not presented until June 28, 1823, but within six years before the action brought:—Held, that the statute was not a bar to the plaintiff's right to recover. (*Thorpe* v. *Booth*, E. T. 1826, N. P., 1 Ry. & M. 388).

(*c*) Contribution.

Davies *v.* Humphreys, H. T. 1840. Ex. 6 *M. & W.* 153.

As to contribution, a party can only recover his proportion paid within six years.

A., B., and C. entered into a joint and several note for payment of a sum, with interest; and A. having been called upon, and paid the amount, brought two actions; one against B., as the principal, for the whole amount, and another against C., as his co-surety for B. Upon a plea of the Statute of Limitations in the action against C.—

The Court held, that as the right of action against the co-surety for contribution attached upon the payment by the plaintiff of any thing beyond his proportion, he could recover only what he had paid beyond that proportion within the six years.

(*d*) Goods.

Helps *v.* Winterbottom, E. T. 1831. K. B. 2 *B. & Ad.* 431.

If goods be sold on credit, and then a bill be given, the statute runs from the time when the bill would have been due.

Goods were sold at six months' credit, to be paid for by bills at two or three months, at the option of the buyer:—Held, by Lord *Tenterden*, Mr. Justice *Littledale*, and Mr. Justice *Patteson*, that the action for goods sold and delivered, brought within six years from the expiration of the nine months, was in time; dubitante, Mr. Justice *Park*, who inclined to the opinion that the action might have been brought at the end of six months, if no bill were then given.

(*e*) Indemnity.

Collinge *v.* Haward, T. T. 1838. Q. B. 9 *Ad. & E.* 633; S. C. 1 *P. & D.* 502.

On an undertaking to indemnify the statute runs from the time of payment.

Upon an undertaking to indemnify the plaintiff against a distress and all costs of any action, &c., by replevying the same—

The Court held, that the injury to which the indemnity applied arose at the time of the plaintiff paying the costs of such suit, and not of the delivery of the bill of costs; and that the statute did not begin to run until after such payment.

(*f*) Negligence.

Howell *v.* Young, H. T. 1826. K. B. 5 *B. & C.* 259; S. C. 8 *D. & R.* 14; S. C. 2 *C. & P.* 238.

The Statute of Limitations, with respect to an attorney's negligence, runs from the time of the loan,

This was an action against an attorney for negligence. The declaration stated the retainer of the defendant, an attorney, to ascertain whether certain mortgages and warrant of attorney were a valid and sufficient security for a loan, and alleged his misrepresentation and his conduct in the premises; and that the securities afterwards turned out wholly insufficient, to which the Statute of Limitations

was pleaded. It appeared that the loan was made and securities given in 1814, and the interest regularly paid until 1820.

and not the discovery of the breach of duty.

The Court held, that the allegation of special damage did not alter the gist of the action, which was the misconduct of the defendant, which having taken place more than six years since, although the discovery was only recent, the plea was a good bar.

(*g*) RENT-CHARGE AND ANNUITIES. See the 3 & 4 Will. 4, post, p. 556.

STRACHAN *v.* THOMAS, T. T. 1840. Q. B. 4 *P. & D.* 229.

DEBT on a covenant by specialty to recover rent-charge—

A rent-charge is not within the 3 & 4 Will. 4, c. 42, s. 3*.

The Court held it not to be an action for arrear of interest of money charged upon land, within 3 & 4 Will. 4, c. 42, s. 3, limiting the period of bringing an action in respect thereof to six years, and that such action might be brought within twenty years.

JAMES *v.* SALTER, H. T. 1836. C. P. 2 *Bing. N. S.* 505; S. C. 2 *Scott*, 750.

So, an annuity by will is not within the 3 & 4 Will. 4.

AN annuity was devised, charged on freehold, if certain leasehold property specified should be insufficient—

The Court held, 1st, that as against the devisee the will was not evidence that the testator died possessed of the leasehold; and, 2ndly, that he was not barred by the 3 & 4 Will. 4, c. 27, ss. 2, 3, such devisee not being within either of the descriptions in the statute in which the right shall be deemed to have first accrued within twenty years.

II. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS THE FORM OF ACTION.

(*a*) PERSONAL ACTIONS.

PIGGOTT *v.* RUSH, E. T. 1836. K. B. 6 *N. & M.* 376; S. C. 4 *Ad. & E.* 912.

The saving clause in the 21 Jac. 1 applies to assumpsit for unliquidated damages.

ASSUMPSIT against defendant for negligence, in conducting certain proceedings in Chancery; plea, that the cause of action did not accrue within six years. Replication, that the plaintiff was in prison when the cause of action accrued, and that she commenced her action within six years next after she was at large. Rejoinder, that she commenced it before she was at large, and that the cause of action did not accrue within six years. Demurrer and joinder in demurrer.

The Court held themselves bound by the two decisions of *Chandler*

* The 3 & 4 Will. 4, c. 27, s. 42, limiting the recovery of arrears of interest and rent to six years, does not apply to actions commenced before 24th July, 1833, when it passed. (*Paddon* v. *Bartlett*, 1835, Ex. Chamb., 5 N. & M. 383). Covenant for rent arrears may be brought within the time limited by 3 & 4 Will. 4, c. 42, s. 3, and is not limited to six years by the 3 & 4 Will. 4, c. 27, s. 42. (*Paget* v. *Foley*, 3 Scott, 120; 2 Bing. N. S. 69). A rent-charge is not barred by the Statute of Limitations. (*Cupit* v. *Jackson*, T. T. 1824, Ex., 1 M'Clell. 495).

v. *Vilett*, (2 Saund. Rep. 120), and *Crosier* v. *Tomlinson*, (2 Mod. 71), and considered that there was no ground for any distinction between indebitatus assumpsit and assumpsit for unliquidated damages.

GRANGER *v.* GEORGE, H. T. 1826. K. B. 5 *B. & C.* 149.

Where the defendant had six years ago delivered the article to the plaintiff's assignee:—Held, that the defendant might plead the Statute of Limitations.

IN an action of trover, it appeared that the defendant had delivered up on the 10th November, 1818, to the plaintiff's assignees the box of papers, &c., for which the action was brought.

The Court held, that not having had them in his possession within six years there could have been no conversion, and that the plea of the Statute of Limitations was a bar, and that the want of knowledge in the plaintiff made no difference. It appearing also that the plaintiff's writ was returnable on the 29th November, although filed generally as of Michaelmas Term:—Held, that the Court was bound to consider the bill as exhibited on that day.

The 3 & 4 Will. 4, regulates the limitation of actions of debt on specialties, &c.

BY 3 & 4 WILL. 4, c. 42, s. 3, it is enacted, "That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the then session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: Provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

(*b*) REAL ACTIONS. See 3 & 4 Will. 4, c. 27, ante, Vol. III., p. 511.

DOE *d.* LINSEY *v.* EDWARDS, T. T. 1836. K. B. 6 *N. & M.* 633; S. C. 5 *Ad. & E.* 95.

With respect to estates, a solitary act will not prevent the operation of the statute of James.

A PARTY to whom attornment had been made upon his claiming as devisee in reversion, after failure of the previous estates tail, did not follow it up by any assertion of right for upwards of thirty years, and the property was dealt with during the whole period by those under whom the defendants claimed as their rightful property, (founded upon recovery suffered by the first tenant for life),

who received quit-rents, granted leases, and executed conveyances under which possession had been had.

The Court held, that such a solitary act did not prevent the bar under the statute of James.

DOE *d.* PARKER *v.* GREGORY, M. T. 1834. K. B. 4 *N. & M.* 308; S. C. 2 *Ad. & E.* 14.

An adverse possession for twenty years is a bar to the ejectment*.

A PERSON came in by right, but remained in possession for twenty years after his title had ceased.

The Court held that a remainder-man was barred by the Statute of Limitations; and it was not necessary that there should be any disseisin in order to create a title by adverse possession.

DOE *d.* COLCLOUGH *v.* HULSE, M. T. 1825. K. B. 3 *B. & C.* 757; S. C. 5 *D. & R.* 650.

The 21 Jac. 1 did not run until the title accrued, unless there was an adverse possession.

THE testator having devised lands to his nephew and two nieces, as tenants in common, and one of the latter dying in his lifetime, leaving an infant daughter, he had intended by will to substitute such child in its mother's place, but the will was never executed. After his death the nephew and niece covenanted to carry such unexecuted will into effect, and to convey one-third to trustees in trust, to convey to the infant on attaining twenty-one, or to the issue, if dying under twenty-one and leaving issue, or, if no issue, to the nephew and niece in equal moieties. Such conveyance was never executed, but the trustee received the rents for the use of the infant during her lifetime. The nephew having demised all his estates to the wife of one of the lessors of plaintiff, who, within twenty years after the death of the infant, brought ejectment—

The Court held, that, as the nephew could not have taken that portion of the rents without a breach of covenant, there was no adverse possession until the death of the infant, and that the plaintiff's title was therefore not barred under 21 Jac. 1.

DOE *d.* THOMPSON *v.* THOMPSON, E. T. 1837. K. B. 1 *N. & P.* 215; S. C. 5 *Ad. & E.* 532.

The possession under 3 & 4 Will. 4, must be adverse†.

A PARTY had held possession of land, without payment of rent or any acknowledgment for twenty years, but not adversely to the real owner.

The Court held, that his heir-at-law could not, within five years

* D. mortgaged land in fee to J., subject to a proviso of cesser, upon payment of the money secured, upon a day more than twenty years before the passing of stat. 3 & 4 Will. 4, c. 27. Within twenty years before the passing of the statute, D. acknowledged that the mortgage money was unpaid. In ejectment brought by the heir of J. within five years after the passing of the statute, the jury found that the mortgage money was unpaid:—Held, that the ejectment was not barred by sect. 2, D.'s possession not being adverse at the time of passing the statute; and therefore the lessor of the plaintiff had, by sect. 15, five years to bring the action, though no proof was given that he had been in possession, or received rent or interest. (*Doe* d. *James* v. *Williams*, H. T. 1837, K. B., 5 Ad. & E. 291).

† The 1 Vict. c. 28, amends the 3 & 4 Will. 4, c. 27, as to real property. Section 12 of 3 & 4 Will. 4, c. 27, has relation back as far as relates to the period of the act, and makes the possession of one co-parcener, joint tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession. (*Culley* v. *Doe* d. *Taylerson*, 3 P. & D.

after the passing of the 3 & 4 Will. 4, c. 27, maintain an ejectment against the widow, who continued to occupy after the death of the tenant at will.

DOE *d.* DAVY *v.* OXHENHAM, M. T. 1840. Ex. 7 *M. & W.* 131.

The non-receipt of rent under an agreement is no bar to an ejectment under 3 & 4 Will. 4.

THE party seised in reversion of an estate, held by the defendant as assignee of a lease for ninety-nine years, determinable on lives, had agreed with the defendant's assignor, in consideration of money expended on the premises, to call for no rent during the life of the surviving assignee.

The Court held, that the non-receipt for twenty years did not bar him, under 3 & 4 Will. 4, c. 27, s. 2, from recovering in ejectment at any time within twenty years after the determination of the lease.

DOE *d.* CORLY *v.* BRANSON, E. T. 1835. K. B. 4 *N. & M.* 664.

Under 3 & 4 Will. 4, c. 27, s. 17, held, that the action was barred where the devisee in fee and mother of the lessor of the plaintiff was not shewn to have been in possession for above forty years.

THE devisee in fee and mother of the lessor of the plaintiff was not shewn to have been in possession for above forty years before the title of the lessor accrued, nor any evidence offered as to the circumstances under which the devisee and her husband quitted the premises and removed to a distant part of the country.

Per Cur.—The question arises on the 17th section of the stat. 3 & 4 Will. 4, c. 27. It appears, that a person who had been in the possession of the premises in right of his wife more than forty years ago left them, and removed with his wife to a considerable distance from the place where the lands are situate. After his wife died her heir sought to recover the premises in this action. The fact being clear, that within the terms of 3 & 4 Will. 4, c. 27, s. 3, the plaintiff's mother was dispossessed or discontinued the possession or receipt of the rents above forty years before the action brought, the action is barred by the 17th section of the act.

III. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS PARTICULAR PERSONS.

RHODES *v.* SMETHURST, T. T. 1838. Ex. 4 *M. & W.* 42.

No representative being appointed does not suspend the statute.

A. HAVING a cause of action against B. in 1829, B. died in 1830, A. not having commenced any action against him. In 1835 letters of administration with the will annexed of B. were granted to C., and in the same year A. brought his action against C. for the debt of B.

The Court held, that he was barred by a plea of the Statute of

539). Where A., in 1817, let B. into possession of lands as tenant at will, and in 1827 A. entered upon the lands without B.'s consent, and cut and carried away stone therefrom:—Held, that this entry amounted to a determination of the estate at will, and that B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties; and therefore, that, unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as, by the stat. 3 & 4 Will. 4, c. 27, s. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will; i. e. in the year 1818. (*Doe* d. *Bennett* v. *Turner*, M. T. 1840, Ex., 7 M. & W. 226).

Limitations, and that he was not entitled to deduct from the six years the time between the death of B. and the granting of administration to C.

PRATT *v.* SWAINE, E. T. 1828. K. B. 8 *B. & C.* 285; S. C. 2 *M. & Ry.* 350.

To trover by an administrator for a conversion before and after the death, the defendant cannot plead not guilty within six years.

IN an action of trover by an administrator, the declaration alleged that defendant, knowing the goods to have been the property of the intestate, and of the plaintiff as administrator since his death afterwards, and after the death of the intestate, to wit, &c., converted, &c.; the defendant pleaded not guilty within six years. Upon special demurrer—

The Court held the plea bad, as the plea might be true, and yet the cause of action accrued to the plaintiff as administrator within six years.

EMERY *v.* DAY, T. T. 1834. Ex. 1 *C., M. & R.* 245; S. C. 4 *Tyrw.* 695.

Where the trustees of tolls order things to be done and to be paid for, but no entry is made, the statute is a bar.

BY the local act the tolls collected were to be applied in a certain order, and before the trustees were in funds for the purpose they contracted with the plaintiff for building toll-houses, &c.; and, after the works done, at a meeting within six years they ordered the money to be raised, and the plaintiff's among other bills to be paid, but no entry was made of such order. Upon the plea of the Statute of Limitations—

The Court held, that, in the absence of any fact of part payment or note in writing produced, it was a bar to the action.

IV. RELATIVE TO THE TIME WITHIN WHICH THE ACTION MUST BE BROUGHT, AS REGARDS PARTICULAR STATUTES.

LLOYD *v.* WIGNEY, M. T. 1833. C. P. 6 *Bing.* 489; S. C. 4 *M. & P.* 222.

The words,—an action is to be brought within six months "after the matter or thing done,"—do not mean when the injury occurred.

IN an action against commissioners under a local improvement act, requiring the action to be brought within six months after the matter or thing done, the grievance alleged being an injury to the plaintiff's house in digging a sewer, whereby the foundation sank, and the walls cracked, and the plaintiff was disturbed in the enjoyment, and customers were prevented from having access to his house.

The Court held, 1st, that, the action not being brought within six months after the digging the sewer, which occasioned the crack in the wall, the action could not be supported; the continuance of the crack was not a continuing damage, nor repetition of the injury; and, 2ndly, that the notice of action and declaration also not alleging the keeping up the shores as a distinct ground of injury, the action could not be sustained in respect thereof, although continued up to within the time limited for the action.

SMITH *v.* SHAW, M. T. 1829. K. B. 10 *B. & C.* 277.

The giving directions may be

THE 50 Geo. 3, c. 107, a dock act, authorized the appointment of a dock-master, who was to have power to direct the mooring &c. of

a thing done in pursuance of the act.

vessels, and to have the control over vessels coming into or going out of the docks with 100 yards of the entrance, and provided that all actions brought for anything done in pursuance of the act should be commenced within six calendar months after the fact committed.

The Court held, that an action for an injury sustained within 100 yards of the entrance, by reason of improper directions of the dock-master, ought to have been commenced within the period limited, the giving directions being a thing done in pursuance of the act.

WORDSWORTH *v.* HARLEY, M. T. 1830. K. B. 1 *B. & Ad.* 391.

Under the Highway Act the three months mean from the time of the act done.

IN an action against the surveyor of the highways, for widening the road, and thereby taking away a part of the land of the person whose land adjoined—

The Court held, that the action must be brought within three months from the time of the act done, according to the 13 Geo. 3, c. 78, s. 81, and the mere continuing the land separated from the rest of the owner's land, is not an act for which he can maintain an action against the surveyor, after the expiration of three months from the original separation.

V. RELATIVE TO HOW THE OPERATION OF THE STATUTE MAY BE AVOIDED.

(*a*) BY ACKNOWLEDGMENT.

1. *Before* 9 *Geo.* 4, *c.* 14*. See, also, post, p. 570.

* If a party, when he is arrested, say, "I shall go to my attorney, and pay the debt and settle it," such statement is sufficient to take the case out of the Statute of Limitations. (*Triggs* v. *Newnham*, H. T. 1825, N. P., 1 C. & P. 631). So, the following letter from the defendant to plaintiff's attorney was given in evidence by a plaintiff in answer to a plea of the Statute of Limitations:—"I have received yours respecting plaintiff's demand; it is not a just one. I am ready to settle the account whenever plaintiff thinks proper to meet on the business; I am not in his debt 90*l.*, nor anything like that sum. Shall be happy to settle the difference by his meeting me:"—Held, that the Judge was justified in directing the jury that after the letter the Statute of Limitations was out of the question. (*Colledge* v. *Horn*, E. T. 1825, C. P., 3 Bing. 119). And an acknowledgment to take a case out of the Statute of Limitations might be inferred from the conduct of the party without any verbal promise or admission. Therefore, where the acceptor, under the circumstances above stated, being sued by the party to whom the bills really belonged, gave notice to A. and B. that, in the event of a verdict passing against him, he should be entitled to recover the sum previously paid on the bills from the parties to whom it was paid; and A. and B., in consequence, advised particular proceedings in the defence, and continued during the whole course of the action to be consulted and to advise upon it: this was held sufficient evidence to warrant the jury in finding an acknowledgement by A. of a debt due by him, so as to enable the acceptor to succeed in an action against him for money paid, or to prove under a commission of bankrupt against him, notwithstanding the Statute of Limitations. (*East India Company* v. *Prince*, T. T. 1826, N. P., 1 Ry. & M. 407). But, where plaintiff said to defendant, "Pay me the 10*l.* you owe me;" to which defendant replied, he would, if plaintiff had not removed certain articles which he considered fixtures:—Held, not to be such an unqualified admission of liability as to entitle the plaintiff to recover. (*Evans* v. *Verity*, 1825, N. P., 1 Ry. & M. 239). So, defendant being arrested on a debt more than six years old, said, "I know that I owe the money, but the bill I gave is on a three-penny receipt stamp, and I will never pay it:"—Held, not such an acknow-

COLLYER *v.* WILLOCK, T. T. 1827. C. P. 4 *Bing.* 313; S. C. 12 *Moore*, 557.

A payment into Court of the principal did not revive a claim as to interest.

THE defendants, being sued for a sum due for principal and interest from their testator, pleaded the Statute of Limitations, and paid the principal into Court, but refused to pay the interest.

The Court held, that the payment of the principal into Court did not amount to an implied promise to pay the interest, so as to take that out of the statute.

M'CULLOCK *v.* DAWES, M. T. 1828. K. B. 9 *D. & R.* 40.

One executor could not bind his co-executors nor himself without a clear and express acknowledgement*.

THE declaration contained counts, averring promises made by the defendants' testator in his lifetime, and other counts averring promises made by the defendants as executors. The defendants pleaded the general issue, and the Statute of Limitations. It appeared that one of several executors, acting in the affairs, said that he believed

ledgment as would revive the debt against a plea of the Statute of Limitations. (*A'Court* v. *Cross*, M. T. 1825, C. P., 3 Bing. 329). And where, on being applied to for payment, the defendant said, he should be happy to pay it if he could, and, no evidence of ability being given, had a verdict, the Court refused a new trial. (*Ayton* v. *Bolt*, M. T. 1826, C. P., 4 Bing. 105). So, where, to a plea of the Statute of Limitations, the plaintiff replies a promise within six years, and proves a promise to pay when of ability made three years after the original cause of action accrued and within six years of the commencement of the action:—Held, he must prove the defendant's ability. (*Scales* v. *Jacob*, T. T. 1826, C. P., 3 Bing. 638). Where the only evidence of acknowledgment was a memorandum in the defendant's handwriting in the form, "I. O. U. 100*l.*" of a date beyond six years; and on the same paper was, as a separate memorandum, "received 50*l.*," dated within six years:—Held, that the latter did not amount to such a recognition of the former sum being still due as to found a promise to take it out of the statute, and consequently the plaintiff was only entitled to recover the latter sum. (*Robarts* v. *Robarts*, 3 C. & P. 296; S. C. 1 M. & P. 487). So, where the defendant, upon being applied to for the debt, replied, that he had a receipt in full, which he would search for:—Held, that whether true or false, it was clear he did not intend to pay; and therefore, no promise to pay could be inferred; (*Brydges* v. *Plumptree*, T. T. 1828, K. B., 9 D. & R. 746); and where the evidence to take the case out of the statute was a deed of composition, in which the defendant stated that he was indebted to the plaintiff in the sum opposite his signature, but the plaintiff had never signed the deed, nor did the amount in any way appear:—Held, that it could not be coupled with a parol admission that there was no other due than that on the note on which the action was brought, and that there was no sufficient acknowledgment to take the case out of the statute. (*Kennett* v. *Milbank*, E. T. 1832, C. P., 8 Bing. 38; S. C. 6 M. & P. 102). In assumpsit, brought to recover a sum of money, the defendant pleaded the Statute of Limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant, within six years: "I cannot pay the debt at present, but I will pay it as soon as I can:"—Held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. (*Tanner* v. *Smart*, E. T. 1827, K. B., 6 B. & C. 603). Where one of the defendants, upon being called upon to pay a debt due from him and his late partner, observed, that "it was hard he should be called upon to pay when there were so many outstanding debts due to the concern uncollected," and, upon a second application, desired that the account might be handed to W., who was "to settle the business:"—Held, that it was not a conditional promise, but was properly left to the jury to say whether the whole amounted to a promise or not. (*Pierce* v. *Brewster*, T. T. 1827, C. P., 12 Moore, 515).

* In an action against several executors; pleas, general issue and Statute of Limitations:—Held, that neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, takes the case out of the statute; there must be an express promise by all. (*Tallock* v. *Dunn*, T. T. 1826, N. P., 1 Ry. & M. 416).

that the debt was a just one, and had never been paid, and that he should be glad to serve the plaintiff if he could, but that he could not do anything without the consent of the testator's family.

The Court held, that it was neither a personal promise to pay the debt, nor even a personal acknowledgment of its existence, and therefore insufficient to take the case out of the statute.

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2. *Since 9 Geo. 4, c. 14.*

1.—*Construction of the Statute.*

Acknowledgment or promise must be in writing, and signed by the party chargeable therewith*.

By 9 Geo. 4, c. 14, s. 1, "That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the 21 Jac. 1, and 10 Car. 1, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason of any written acknowledgment or promise made and signed by any other or others of them: Provided that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

2.—*Of the Memorandum.*

WAUGH *v.* COPE, T. T. 1840. Ex. 6 *M. & W.* 824.

Letters to take the case out of the statute must identify the debt†.

THE plaintiff's bill was for business done as an attorney above six years ago, and to take the case out of the statute, it was shewn that the defendant having been called on to attend as a witness in a lunacy case, to which plaintiff was solicitor, the latter wrote to

* An action, commenced after the 9 Geo. 4, c. 14, came into operation, cannot be supported on a verbal promise made before. (*Fowler* v. *Chatterton*, E. T. 1830, C. P., 6 Bing. 258). It has frequently been held at Nisi Prius, that the 1st section of the 9 Geo. 4, c. 14, applies to parol acknowledgments made before its provisions came into operation; and semble that, from its wording, such construction is the right one. (*Ansell* v. *Ansell*, H. T. 1829, N. P., 3 C. & P. 563).

† The acknowledgment in writing, to take a case out of the Statute of Limitations, must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. (*Bucket* v. *Church*, T. T. 1840, N. P., 9 C. & P.

him for an account of his expenses, to which the defendant replied, requesting the plaintiff to allow what was usual, and place the same to his account; although plaintiff, in a note informing him what would be allowed, desired to have receipts, to take in before the Master, adding, "I will give him credit for the same in my account against him." These sums were afterwards received by the plaintiff.

The Court held, that the letters were not sufficient evidence of there being payments in discharge of the debt for which the action was brought to take the case out of the statute.

WHIPPY *v.* HILLARY, H. T. 1832. K. B. 3 *B. & Ad.* 399; S. C. 5 *C. & P.* 209.—S. P. HYDE *v.* JOHNSON, E. T. 1836. C. P. 2 *Bing. N. S.* 776; S. C. 3 *Scott*, 230.

Acknowledgment should be signed by the party "chargeable thereby."

THE letter relied on to take the case out of the statute only stated that arrangements had been made to put sufficient funds in the hands of a third party as a trustee, to whom the amount of the plaintiff's demand had been sent, and who had authorized the defendant to refer to him for further information—

The Court held, the acknowledgment not sufficient within 9 Geo. 4, c. 14, which requires the acknowledgment or promise to be signed by the party chargeable thereby.

MORRIS *v.* DIXON, E. T. 1836. K. B. 6 *N. & M.* 438; S. C. 4 *Ad. & E.* 845.

But it seems the acknowledgment need not be stamped;

PLEA, the Statute of Limitations. To take the case out of the statute, the defendant gave a memorandum, whereby he promised to pay the debt as soon as it was in his power—

The Court held, that, there being other evidence of the debt, and the memorandum being put in to take the case out of the statute, it was exempt from stamp duty.

WHEATLEY *v.* WILLIAMS, T. T. 1836. Ex. 1 *M. & W.* 533.

and the Court of Exchequer entertain the same view.

THE defendant having employed the plaintiff and his partner in the sale of books within six years, by letter acknowledged the return of some as imperfect, concluding, "which, together with the cash overpaid on the settlement of your account, amounts to £——, which sum I will pay you within two years from this date."

290). If, since the stat. 9 Geo. 4, c. 14, a defendant by a letter admit a balance to be due, without stating the amount, this will take the case out of the Statute of Limitations, so as to entitle the plaintiff to nominal damages. The object of the stat. 9 Geo. 4, c. 14, was to procure that in writing for which words were previously sufficient. (*Dickenson* v. *Hatfield*, M. T. 1831, N. P., 5 C. & P. 46; S. C. 2 M. & M. 141). But where the defendant in a letter, in answer to an application for the debt, said, "I will see D. or write to him; I have no doubt he has paid it; if by chance he has not, it is very fit it should be:"—Held not a sufficient acknowledgment to take the case out of the statute. (*Poynder* v. *Bluck*, E. T. 1837, B. C., 5 D. P. C. 570). So, where a defendant had written a letter to T., to make a proposition to the plaintiff respecting a debt he owed him, and in this letter he desired T. to arrange with the whole of his creditors. T. wrote a letter to the plaintiff, offering an acceptance for 7*s.* 6*d.* in the pound on the debt:—Held, not sufficient to take the case out of the Statute of Limitations. (*Gibson* v. *Baghott*, H. T. 1832, N. P., 5 C. & P. 211). A verbal acknowledgment of the payment of part of a debt within six years is not sufficient, within the statute of 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations. (*Willis* v. *Newham*, H. T. 1830, Ex., 3 Y. & J. 518).

The Court held, that such letter, although stamped with an agreement stamp at the time of being signed, was within the exemption of 55 Geo. 3, c. 184, s. 10, and admissible in evidence without a stamp.

MORRELL *v.* FRITH, E. T. 1838. Ex. 3 *M. & W.* 402; S. C. 8 *C. & P.* 246, *questioning* LLOYD *v.* MAUND, 2 *T. R.* 760.

The words, "I have been in daily expectation to give a satisfactory reply respecting the demand of M. against me,"

To take a case out of the Statute of Limitations, the plaintiff produced the following letter, signed by the defendant: "Since the receipt of your letter, and indeed, for some time previously, I have been in almost daily expectation of being enabled to give a satisfactory reply to your first application, respecting the demand from Messrs. Morrell upon me; I propose being in Oxford to-morrow morning, when I will call upon you on these letters." At the trial *Gurney*, B., decided that this was not an acknowledgment, and nonsuited the plaintiff. Upon motion for a new trial, on the ground that this was a question for the jury, the rule was refused; and—

The Court held, that this was within the province of the Judge, and need not be submitted to the jury.

ROUTLEDGE *v.* RAMSAY, E. T. 1838. Q. B. 3 *N. & P.* 319.

or giving a list of accounts to collect, and then writing, "you and me will be clear," is not a sufficient promise*.

ASSUMPSIT on a note; plea, Statute of Limitations. To take the debt out of the operation of the statute, the plaintiff put in the note, and also the following memorandum from the defendant: "Alston, June 1, 1830.—Mr. Joseph Routledge, I give the above accounts to you; so you must collect them and pay yourself, and you and me will be clear. John Ramsay."

The Court held the memorandum not a sufficient promise in writing by the party to be charged thereby, within the 9 Geo. 4, c. 14, s. 1.

MARTIN *v.* KNOWLES, E. T. 1833. K. B. 1 *N. & M.* 421.

So, a memorandum, charging a reversionary interest when the same should fall in, is not sufficient;

ASSUMPSIT; plea, Statute of Limitations. In order to take the case out of the statute, the plaintiff put in evidence the following document: "I do hereby charge my reversionary interest, when the same shall fall into possession, and be rendered available to my use, with the payment of 108*l.* 18*s.* 9*d.* to Mr. W. Martin, to carry lawful interest."

The Court held the document not to be such an acknowledgment as to raise an implied promise to pay.

* Enclosing a cheque for part, but denying all liability as to the residue, does not raise a promise to pay. (*Brigstocke* v. *Smith*, E. T. 1833, Ex., 1 C. & M. 483). So, a promissory note, improperly stamped, is not admissible as a memorandum to take the case out of the Statute of Limitations, under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp. (*Jones* v. *Ryder*, M. T. 1838, Ex., 4 M. & W. 32). But the defendant having a claim against the plaintiff, the latter, at the foot of his bill, acknowledged the debt as follows: "By Mr. Lacy's bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request above, I send you my bill, which I will thank you to peruse, and, if correct, favour me with a bill for the balance:—Held, that this was a sufficient acknowledgment of the defendant's claim to take it out of the Statute of Limitations. (*Waller* v. *Lacy*, E. T. 1840, C. P., 8 D. P. C. 563; S. C. 1 M. & G. 54; S. C. 1 Scott, N. S. 186).

DOBBS *v.* HUMPHRIES, H. T. 1834. C. P. 10 *Bing.* 446; S. C. 4 *M. & Scott*, 285.

THE defendant addressed a letter to the plaintiff, containing these words: "I cannot comply with your request; the best way for you would be to send me the bill that you hold, and draw another for 30*l.* 9*s.* 6*d.*" In an action against the defendant, who pleaded the Statute of Limitations—

The Court held, that the above words amounted to such a distinct acknowledgment of the sum mentioned being due as to take the case out of the statute.

but a direction, by letter, to draw a bill for the balance, is sufficient to take the case out of the statute*.

3.—*Conditional Acknowledgment.*

EDMUNDS *v.* DOWNES, H. T. 1834. Ex. 2 *C. & M.* 459; S. C. 4 *Tyrw.* 173.

IN order to prove an acknowledgment, to take the case out of the Statute of Limitations, the brother of the plaintiff was called, who said that he was at the plaintiff's house in October, 1827, and that he took a letter from the plaintiff to the defendant, and carried back, in answer from the defendant, a letter, which was produced. He said, on cross-examination, that he knew the time, as the week before he had been at a christening at his brother's, the plaintiff's, house. The letter produced contained the following passage: "I shall be most happy to pay you both interest and principal as soon as convenient."

Per Cur.—This is a conditional promise; and the plaintiff must give some evidence of ability or convenience.

The words, "as soon as convenient," compel the plaintiff to give some evidence as to the convenience†.

* An entry in the bankrupt's last examination—Held, evidence of an account stated, as amounting to an absolute admission of a subsisting debt, and sufficient to take the case out of the statute; but that, the subject being a bill of costs, the plaintiff was not entitled to recover without proof of having duly delivered his bill. (*Eicke* v. *Noakes*, 1837, N. P., 2 M. & Rob. 350). So, where a letter was written by defendant to plaintiff, containing the following passage: "I wish I could comply with your request, for I am very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last:"—Held, that this was a sufficient acknowledgment to take the plaintiff's debt out of the statute. (*Bird* v. *Gammon*, M. T. 1836, C. P., 3 Bing. N. S. 883).

† A. having become bankrupt in August, 1819, wrote in November, 1826, a letter to B., in which he spoke of a debt of 98*l.* 15*s.* due from him to B., and said, inter alia, as follows:—"By the end of next month I shall have my bankers' account here, and shall remit the sum due to you in a draft on them:"—Held, in indebitatus assumpsit by B. against A. for the sum mentioned, that the latter contained a sufficient promise to answer a plea of the Statute of Limitations. (*Lang* v. *Mackenzie*, M. T. 1830, N. P., 4 C. & P. 463). But, a letter sent by a debtor to a creditor respecting a debt, which contains in the introductory part these words,—"which is not to be used in prejudice of my rights now or in any future arrangement that may be made or instituted,"—cannot be given in evidence in an action for the debt, for the purpose of taking the case out of the Statute of Limitations. (*Cory* v. *Bretton*, M. T. 1830, N. P., 4 C. & P. 462). So, where a letter, relied on to take the case out of the statute, imported no more than offers on the part of the defendant to surrender his property with a view to an arrangement with his creditors, provided he were allowed time to arrange his affairs:—Held, that they amounted to no more than a conditional offer to pay, and not a general and unqualified acknowledgment from which a promise to pay

DODSON *v.* MACKEY, E. T. 1838. K. B. 8 *Ad. & E.* 225, n.

Whether conditional or not is a question for the jury.

IN assumpsit on a bill of exchange, a letter was produced to take the case out of the Statute of Limitations from defendant to plaintiff, stating, that plaintiff should be informed immediately it was settled how defendant's affairs should be arranged; and adding, "your *account* is quite correct; and Oh! that I were now going to inclose the *amount*." No amount of debt was stated, and no proof was given from the letter or otherwise to what account the letter referred, nor whether the letter applied to the bill. It being left to the jury whether this was an unconditional acknowledgment, and they having found that it was—

The Court held, that there was no ground for a nonsuit; for that the acknowledgment was unconditional; and that the jury, if it was a question for them, had decided it rightly.

4.—*By Part Payment, or Payment of Interest.* See ante, 9 Geo. 4, c. 14, p. 562.

BAYLEY *v.* ASHTON, T. T. 1840. Q. B. 4 *P. & D.* 204.

Part payment must be proved as a fact,

PLEA, the Statute of Limitations. The plaintiff relied on an acknowledgment of part payment to take the case out of the Statute of Limitations. The defendant was clerk to the plaintiff, and in his duty as such made the following entries in the plaintiff's cash-book and ledger, being made as in the person of the plaintiff addressing him (the defendant):—"Thomas Ashton in account with Mr. Bayley. 1829, Dec. 19. To cash lent you to settle the action in Mr. Ackland *v.* Your Father, 24*l.* 1833, April 17. By cash from your father on account of the 24*l.* lent, 1*l.* 0*s.* 5*d.*" The book had the defendant's name at the beginning, but there was no signature to this entry. At the trial a verdict passed for the defendant, this evidence of acknowledgment having been rejected.

The Court held, that, to prevent the operation of the statute part payment must be proved, either as a substantial fact, or, if by acknowledgment, it must be by writing signed by him.

TIPPETS *v.* HEANE, T. T. 1834. Ex. 1 *C., M. & R.* 252; S. C. 4 *Tyrw.* 772.

on account of the particular debt, and that for which the action is brought,

THE plaintiff, to take the case out of the statute, called a witness, who stated that, in 1829, he paid the plaintiff the sum of 10*l.* by the direction of the defendant, but he could not tell upon what account it was paid. *Vaughan*, B., in summing up, observed, that no other account was proved than the one upon which the action

was to be implied; and not sufficient to take the case out of the operation of the statute. (*Fearn* v. *Lewis*, M. T. 1829, C. P., 6 Bing. 359; S. C. 4 C. & P. 173). So, where the defendant, being applied to for some money on account, said he had not got any; and afterwards, upon a second application, the account was mentioned, but he made no answer; and, upon being requested to help the plaintiff to 5*l.*, said he was going to H. in the course of the week, and that he would help him to 5*l.* if he could:—Held, that, even if it were to be taken to amount to a promise or acknowledgment, it was merely a conditional one, and it was therefore incumbent on the plaintiff to shew that the defendant was able to pay that sum. (*Gould* v. *Shirley*, E. T. 1828, C. P., 2 M. & P. 581).

was brought, and left it to the jury to say whether the payment of the 10*l.* was on that account. The jury thereupon found a verdict for the defendant.

The Court held, in order to take a case out of the statute by part payment, it must appear, 1st, that the payment was made on account of the debt; 2ndly, on account of the debt for which the action is brought.

LINSELL *v.* BONSER, M. T. 1835. C. P. 2 *Bing. N. S.* 241; S. C. 2 *Scott*, 399, n.

and must be sanctioned by the debtor.

IN an action for goods sold and delivered, to which the defendant pleaded the Statute of Limitations, letters written by the defendant to the plaintiff, praying of the latter to accept a composition and become a party to a deed of assignment of the defendant's effects, calling upon him in case he would not enter such an arrangement to make him (the defendant) a bankrupt, and thus bring his affairs to a termination, were produced in evidence.

The Court held, that the payment to the plaintiff of a certain sum as part of the debt by the trustee to the deed of composition, contrary to the desire of the defendant, whose intention it was that such payment, if made at all, should be in full discharge of the debt, was not such a payment as brought the case within the proviso of the statute.

EVANS *v.* DAVIES, T. T. 1836. K. B. 4 *Ad. & E.* 840.

Payment of interest will be presumed to be on the particular debt*.

THE defendant, being indebted on a note bearing interest, paid 1*l.*, and said, "This puts straight all the interest for last year, except 18*s.*, and that I will bring some day next week."

The Court held the evidence sufficient in answer to the statute, as made on account of an existing debt, and no other debt being shewn.

BEALEY *v.* GREENSLADE, M. T. 1831. Ex. 2 *C. & J.* 61; S. C. 2 *Tyrw.* 121.

A payment within six years, of interest due above six years on a note, is sufficient to take

IN an action on a promissory note, dated 31st March, 1817, the defendant pleaded the Statute of Limitations. The note appeared to have indorsements in the plaintiff's handwriting for interest received to March 31, 1818, and to March 31, 1820, and also the following indorsement: "January 16, 1826. Received of William Greenslade, by payment of Humfrey Veysey, 6*l.*, being four years'

* Semble, part payment will not bar the interest, where the debt to which it is applied consists of several items. (*Brigstocke* v. *Smith*, 2 Tyr. 445; 1 C. & M. 483). The payment of interest on a note given by churchwardens on the parish account from time to time by the vestry, is a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations, as against the makers; à fortiori, where one of them has audited the parish accounts, in which payments of interest on the note are entered. (*Crew* v. *Petit*, 3 Nev. & M. 456; S.C. nom. *Rew* v. *Pettett*, 1 Ad. & E. 196). Payment of interest upon a promissory note by the makers to the personal representatives of the payee, within six years of the commencement of the action—Held a sufficient acknowledgment to take the case out of the Statute of Limitations, although the letters of administration under which the party claimed, to whom the payments were made, were not obtained in the diocese in which the note was bona notabilia. (*Clarke* v. *Hooper*, 4 M. & Scott, 353; 10 Bing. 480).

the case out of the statute.

interest due on this note, on the 31st day of March, 1824. Thomas Bealey."

The Court held the payment sufficient to take the case out of the statute; the note's remaining in the hands of the plaintiff, the payee, coupled with such payment, raising a ground for the jury to presume that the note itself was not paid.

WATERS *v.* TOMPKINS, M. T. 1835. Ex. 2 *C., M. & R.* 723; S. C. 1 *T. & G.* 137.

Whether payment of interest acknowledges the particular debt, is a question for the jury.

THIS action was brought on notes, inter alia, one of 100*l.*, and two others of 50*l.*; and, to take the case out of the statute, it was proved that the defendant had said his wife would have called and paid him money on account of interest on 200*l.*, if &c.; that the wife shortly afterwards did call and pay a sum, without saying on what account; that she also made several other payments, when the plaintiff, at the time, desired the interest to be more regularly paid.

The Court held, that although, since the 9 Geo. 4, c. 14, s. 1, something more than mere admissions are required, yet that proof of the fact of payments as interest, coupled with such admissions, was sufficient to go to a jury, and, in this case, to warrant a verdict for the plaintiff.

LEESON *v.* SMITH, M. T. 1834. K. B. 4 *N. & M.* 304.

Where the only evidence of any payment within six years was 12*s.* for interest, and the jury found for the plaintiff for 13*l.* 16*s.*, the Court granted a new trial.

IN an action for money lent more than six years before action brought, a witness stated, "The defendant gave me 12*s.*; I gave the 12*s.* to my uncle." On cross-examination, the witness said that she merely asked the defendant for her uncle's interest money, and that the defendant did not tell her anything about it. The jury found a verdict for the plaintiff for 13*l.* 16*s.*

Per Cur.—The evidence did not justify a verdict, finding a debt of 13*l.* 16*s.* A verdict for nominal damages only could, upon this evidence, have been sustained.

5.—*By Delivery of Goods, or Arrears of Rent.*

HART *v.* NASH, T. T. 1835. Ex. 2 *C., M. & R.* 337.—S. P. COOPER *v.* STEVENS, M. T. 1835. K. B. 5 *N. & M.* 635; S. C. 4 *Ad. & E.* 71.

A delivery of goods may be deemed a part payment*.

AT the time of the transfer of the bills, it was agreed that certain goods should be delivered in part payment.

The Court held, that the delivery was to be deemed a part payment within Lord Tenterden's Act, to take the case out of the statute.

* A. owed money to B. for hay for more than six years, and, within six years, said to B., "You use spirits; why not have them of me, as long as I owe you money for hay? If it were ever so little, it would be a way to lessen the debt." B. said he would have a gallon at 12*s.*, and A. went home and sent a gallon of gin to B. In an action by B. for the price of the hay:—Held sufficient to take the case out of the Statute of Limitations, 9 Geo. 4, c. 14. (*Hooper* v. *Stephens*, 1835, N. P., 7 C. & P. 260, questioning *Lechmere* v. *Fletcher*, E. T. 1833, Ex., 1 C. & M. 623).

WILLIAMS *v.* GRIFFITHS, E. T. 1835. Ex. 2 *C., M. & R.* 45.

THE plaintiff, whilst occupying premises of the defendant, at a rent of 16*l.*, agreed to take the place of a person who had been bailiff, &c., and who had 12*s.* a week; and no rent or wages were paid for upwards of twelve years before the action brought for wages.

Since the 9 Geo. 4, arrears of rent remaining against a claim for wages will not take the case out of the statute.

The Court held, that although, before Lord Tenterden's Act, the accruing rent would have been sufficient to have taken the case out of the statute, yet that, since the former act, there must be part payment, or something equivalent to it, to have that effect.

6.—By and to particular Persons.

CLARKE *v.* HOOPER, E. T. 1834. C. P. 10 *Bing.* 480; S. C. 4 *M. & Scott*, 353.

PAYEE of promissory note died intestate, leaving bona notabilia. His administrator took out a diocesan administration only, and not for that diocese in which the maker of the note (the debtor of the intestate) resided; consequently, the administration, quoad the debt in question, was defective. She died, and plaintiff becomes her administrator cum testamento annexo. In such capacity, he received, within a year before the action, a sum in part payment of the debt. In an action for the remainder, and Statute of Limitations pleaded—

A payment of interest to an administrator, who has taken out administration in a wrong diocese, is sufficient to take the debt out of the statute.

The Court held, that such payment took the case out of the statute, notwithstanding the defective administration under which it was received.

MEGGINSON *v.* HARPER, M. T. 1834. Ex. 2 *C. & M.* 322; S. C. 4 *Tyrw.* 94.

A TESTATOR bequeathed legacies to each of his two daughters, to be paid at the age of twenty-one, and, till that period, the expense of board, clothes, and education to be paid by his executors; and he appointed executors, and also trustees, "with all the necessary powers to fulfil his will." At a settlement of the testator's affairs, the executors paid over to the trustees a sum sufficient to pay the legacies of the daughters, when they should attain the age of twenty-one, which sum the trustees then lent to the plaintiff on a promissory note, describing them "as trustees acting under the will of the late Mr. ——."

So, where executors paid over to trustees a sum to be paid to legatees, and they lent the money on a note:—Held, that payment of interest to the legatees was sufficient to take the case out of the statute.

The Court held, that a payment of principal and interest to one of the legatees within six years was sufficient to take the case out of the Statute of Limitations; and that an action might be maintained on the note by the surviving trustee.

7.—By One of several Joint-Contractors. See 9 Geo. 4, c. 14, ante, p. 562.

WYLDE *v.* PORTER, T. T. 1834. K. B. 3 *N. & M.* 585.

IN an action against A. upon a promissory note, more than six years old, and which purported to be the joint and several note of

A payment of interest by one

of several joint and several makers of a note did not take the case out of the statute, unless the attesting witness was called.

A. and B., and the signature of B. to which purported to be attested by C. Evidence of payments of interest within six years by B.—

The Court held, not sufficient to take the case out of the Statute of Limitations, unless C. is called, although it appears that A. signed the note as surety for B., whose name was already subscribed to the note.

SLATER *v.* LAWSON, M. T. 1830. K. B. 1 *B. & Ad.* 396.

So, a payment of interest by the executor of a joint maker does not bind the survivor;

THIS was an action against the maker of a promissory note payable to the plaintiff's testator. The note in question was a joint and several promissory note by the defendant and one Warwick, deceased. It was nearly twenty years old: Warwick had been dead nineteen years. To take the case out of the Statute of Limitations evidence was given of a payment of interest made by the executrix of Warwick.

The Court said that no case had been cited shewing, that, where a note originally joint and several had become several, payment by one of the parties was sufficient to charge the other; that the case of *Atkins* v. *Tredgold*, (2 B. & C. 23), was an authority in point the other way, and in substance undistinguishable from the present. There the payment was made by the survivor; and that payment was held to be insufficient to charge the executors of the deed.

CHANNELL *v.* DITCHBURN, M. T. 1839. Ex. 5 *M. & W.* 494.

but payment by one joint maker of a note is sufficient, since the 9 Geo. 4*.

ASSUMPSIT on a promissory note. The declaration stated that the defendant and one Thomas Ditchburn, in the lifetime of Henry Taylor, to wit, on the 10th of February, 1824, made and delivered to the said Henry Taylor their promissory note in writing, dated the day and year aforesaid, and thereby jointly and severally promised to pay the said Henry Taylor or order the sum of 500*l.*, value received, with lawful interest thereon from the date thereof at thirty-six months after the date thereof. To the first count the defendant pleaded the Statute of Limitations, and to the second and third counts non assumpsit. It appeared that the note became due on the 13th February, 1827; and that, on the 4th of March, 1833, interest had been paid on it by the co-maker Thomas Ditchburn.

The Court held, in the case of a joint and several promissory note, payment of interest by one maker after the lapse of six years from the time of the note becoming due was sufficient to take the case out of the Statute of Limitations, as against the other maker.

WYATT *v.* HODSON, E. T. 1832. C. P. 8 *Bing.* 309; S. C. 1 *M. & Scott*, 442.

So the Common Pleas decided—

ASSUMPSIT on a joint and several promissory note for 1000*l.*, dated in November, 1824, and in which the defendant had joined as a surety for his brother. Plea, the Statute of Limitations. At the trial the plaintiff proved payment of interest by the defendant's brother down to the year 1828, and a verdict was found for the plaintiff. The defendant having leave to move to set it aside and

* Since the 9 Geo. 4, a payment of interest by one of several joint contractors is sufficient to take the case out of the statute. (*Chippendale* v. *Thwaites*, M. T. 1829, N. P., 1 M. & M. 411; S. C. 4 C. & P. 98).

enter a nonsuit, on the ground that payment of interest by a joint contractor would not as against a co-contractor revive a debt barred by the statute—

The Court held, that, notwithstanding the 9 Geo. 4, c. 14, payment of interest within six years by one of several makers of a joint and several promissory note takes the debt out of the Statute of Limitations, as against all.

LECHMERE *v.* FLETCHER, E. T. 1836. Ex. 1 *C. & M.* 623; S. C. 3 *Tyrw.* 450.

THE defendant was indebted to the plaintiff jointly with others; having contracted the debt beyond six years, the declaration alleged a promise by him to pay his proportion of that debt within that time. *at all events as to his proportion;*

The Court held, that such a promise in writing signed by him was a sufficient compliance with the 9 Geo. 4 to take the case out of the Statute of Limitations, as far as related to the defendant's proportion; and that the plaintiff having recovered a verdict in a former action against both parties upon the issue of the statute pleaded by the defendant was not a bar to the second action, in which the question was, whether he had not made himself liable separately for his proportion.

PERHAM *v.* RAYNAL, T. T. 1824. C. P. 2 *Bing.* 306; *supporting* WHITCOMB *v.* WHITING, *Doug.* 652.

IN an action on a promissory note it appeared that the defendants were the joint makers. On the plea of the statute— *and before the 9 Geo. 4, an acknowledgment by one was sufficient.*

The Court held, that an acknowledgment by one of them would prevent the operation of the statute against the others, though only signing the note as sureties and not parties to the acknowledgment.

MANDERSTON *v.* ROBERTSON, E. T. 1829. K. B. 4 *M. & Ry.* 440.

ONE of two joint-makers of a note for 600*l.* had within six years rendered an account to the payee, in which he had debited himself with interest on a sum of 600*l.*, and there was no evidence of such a sum being due on any other account. *So, an account rendered by A., charging himself with interest, is sufficient to take the case out of the statute, as regards himself and another joint maker.*

The Court held, that his acknowledgment was evidence of a promise by one of two joint debtors, and was therefore evidence of a promise by both, and sufficient to take the cause out of the statute; the only question was, whether the 600*l.* mentioned in the account was the sum mentioned in the note.

8.—*By new Contracts.*

IRVING *v.* VEICHT, M. T. 1837. 3 *M. & W.* 90.

THE defendant, a consul at M., being indebted on a balance to the plaintiffs, his correspondents in England, gave two promissory notes, falling due in December, 1825 and 1826, which being outstanding in 1827, an arrangement was made that the defendant's agent should give his acceptance of a bill for £—, and should be authorized by a letter to pay 300*l.* a year out of defendant's salary, and the proceeds of certain wines then in India be remitted in some shape or other to the plaintiff in satisfaction of the balance. *Where a special contract is entered into but not kept, the old debt revives though more than six years old.*

The Court held, that the acceptance of the security of a third party, with an authority to appropriate funds to come into his hands, and which he accepted to act under, was a good consideration for the plaintiff's undertaking to forbear and give time to the defendant. The instalments were paid up to the year 1830.

The Court held, that, on the breach of the latter contract, the plaintiff was remitted to his right of suit on the original debt, and was not barred by the statute and bound to bring his action on the new promise.

REEVES *v.* HEARNE, E. T. 1836. Ex. 1 *M. & W.* 323.

A void subsequent agreement does not take the original debt out of the statute.

DECLARATION by an executor, stating that the defendant was indebted for goods sold in the testator's lifetime, and that in consideration the plaintiff had agreed to accept goods &c. for himself in part payment of the debt, and to forbear for a reasonable time as to the remainder, the defendant undertook to make and deliver to one R. such goods, and to pay the remainder in a reasonable time to the plaintiff; breach, the non-delivery and non-payment; plea, that the debt to the testator accrued six years before the defendant's supposed promise, and that it was made by parol. On special demurrer—

The Court held, that the agreement being only one for accord did not extinguish the original debt, which was therefore barred by the statute.

JONES *v.* RYDER, T. T. 1838. Ex. 4 *M. & W.* 32.

Hence a promissory note on an insufficient stamp is not a valid acknowledgment.

PLEA, Statute of Limitations. To take the case out of its operation, a promissory note, which was produced, but could not be read as a promissory note, because it was only stamped with a shilling stamp, was offered in evidence as an acknowledgment by the defendant within six years to take the case out of the statute. It was as follows:—"Upon demand I promise to pay to Jeremiah Jones the sum of 15*l.* with lawful interest for the same, for value received, this 5th day of January, 1832. Signed, R. Ryder. The mark × of Ellenor Jones." The learned Judge allowed the note to be read, and directed the jury to find a verdict for the plaintiff, with nominal damages; and they found the debt to be 15*l.*, and the interest 4*l.* 12*s.* 6*d.*, separately. Leave was given to the defendant to move to enter a nonsuit, or to reduce the sum found for the plaintiff by the amount of the interest.

The Court held, that it could not be read as an acknowledgment to take the case out of the statute.

9.—*Evidence of**.

HAYDON *v.* WILLIAMS, M. T. 1830. C. P. 7 *Bing.* 163; S. C. 4 *M. & P.* 811.

If an acknowledgment under

IT appeared in the action that a written acknowledgment, since the 9 Geo. 4, taking the case out of the statute, had been lost—

* In this case it appeared a bill was drawn by the defendant on the assignee of a partner, and accepted in 1822, but not paid until 1827:—Held, that, even supposing the drawing to be evidence of an acknowledgment of a debt due on account

The Court held, that parol evidence may be given of a written promise to take a case out of the Statute of Limitations, when the writing is lost.

the 9 Geo. 4 be lost, parol evidence may be given.

DODSON *v.* MACKEY, H. T. 1834. K. B. 4 *N. & M.* 327.—S. P. DOE *d.* CURZON *v.* EDMONDS, H. T. 1840. Ex. 6 *M. & W.* 295.

THE defendant pleaded the Statute of Limitations. To take the case out of the statute, the plaintiff shewed that the defendant in one letter expressed himself to the plaintiff in these terms: "I can never be happy until I have paid not only you but all to whom I owe money; it is impossible to state what will be done in my affairs at present, but immediately it is settled you shall be informed; your account is quite correct, and oh! that I were now going to inclose you the amount of it;" and in another letter to a third person, in reference to a creditor who had threatened proceedings, "If she will only have patience, I will in time pay her every farthing, as also Miss D. (the plaintiff) what I am indebted to her."

What is a sufficient acknowledgment is a question for the jury.

The Court held, it was properly left to the jury to say if they amounted to an acknowledgment or promise to pay an existing debt, and that it was rightly decided that it was not a conditional promise, but that the plaintiff was only entitled to nominal damages.

LINSELL *v.* BOWSER, M. E. 1835. C. P. 2 *Bing. N. S.* 241; S. C. 2 *Scott*, 392, *n.*

THE plaintiff having refused to execute a composition deed, by which the defendant had conveyed all his property to creditors, and being pressed for payment, the defendant replied that he had given up his affairs, and considered that he had nothing to do with the claim, nor should he; and wishing the plaintiff to make him a bankrupt, as it was in his power—

As, whether a promise can be implied from a letter.

The Court held it to have been properly left to a jury to say if a promise to pay could be implied.

(*b*) BEING ABROAD. See 3 & 4 Will. 4, c. 42, s. 7.

LANE *v.* BENNETT, H. T. 1836. Ex. 1 *M. & W.* 70; S. C. 1 *Tyrw.* 441.

UPON the question, on the Statute of Limitations beginning to run against a party absent in Ireland at the time of the cause of action accruing, whether Ireland was a place beyond the seas, within 4 Anne, c. 16, s. 19.

Ireland is a place beyond the seas.

The Court held, that the 3 & 4 Will. 4 could not be construed to extend to the 4 Anne, c. 16; and that Ireland is not by the Act of Union constructively brought within those limits.

of the original demand for which the bill was given, and in an action subsequently brought against the drawer, yet that it could be evidence of a promise only a the time when the bill was given, and not at the time when paid, and the debt was not thereby taken out of the statute. (*Gowan* v. *Foster*, H. T. 1831, K. B., 3 B. & Ad. 507).

(*c*) By process.

The 2 Will. 4, c. 39, regulates the avoidance of the statute by process.

By 2 Will. 4, c. 39, s. 10, no writ issued by authority of the act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and capias may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon, or arrested therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be.

Williams *v.* Roberts, H. T. 1835. Ex. 1 *C., M. & R.* 676; S. C. 3 *D. P. C.* 512.

To save the statute the first writ may be returned non est inventus without service*.

By the 2 Will. 4, c. 39, s. 10, where successive writs are sued out upon returns of non est inventus, to avoid the Statute of Limitations, such returns must be entered of record before the expiration of one calendar month after the return; but—

The Court held, it was not necessary that the first writ should be actually served, or that there should be any bonâ fide attempt to serve it.

Plummer *v.* Woodburne, T. T. 1825. K. B. 4 *B. & C.* 625; S. C. 7 *D. & R.* 25.

The plaintiff may declare on the process first issued.

To a plea of the Statute of Limitations the replication alleged a bill of Middlesex, A. *v.* B., sued out in a plea of trespass, and various other writs, "in the form aforesaid," continuing the process, and the last with an ac etiam clause—

* A bill of Middlesex was a good continuance of a latitat, in order to save the Statute of Limitations. (*French* v. *Mawwood*, T. T. 1834, B. C., 2 D. P. C. 565). The Court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the Statute of Limitations; but the plaintiff must proceed according to the provisions of the 2 & 3 Will. 4, c. 39, s. 10. (*Frith* v. *Donegal*, T. T. 1834, B. C., 2 D. P. C. 527). An alias capias may be issued more than four months after the expiration of the first capias, without affecting the validity of the former writ; and the continuance between the first writ and the subsequent writ may, as formerly, be entered at any time, unless the writs are issued with a view to avoid the Statute of Limitations, in which case only the directions contained in the proviso of sect. 10 of 2 Will. 4, c. 39, need be complied with. (*Nicholson* v. *Leman*, M. T. 1833, Ex., 2 D. P. C. 296; S. C. 2 C. & M. 469).

The Court held, that, as the plaintiff might have declared on the first process (as he had done), the second was no departure, but a mere addition to it, and the latter process might therefore be well connected with the former, so as to avoid the plea of the statute.

GREGORY *v.* HURRILL, T. T. 1823. C. P. 8 *Moore*, 189; S. C. 1 *Bing.* 324.

ONE of two defendants being abroad, writs of capias, alias, and pluries, returnable in Michaelmas, 1812, and Hilary, 1813, were sued out against both with a view to outlawry against the former, but, a commission having issued against the latter, the proceedings as to outlawry were suspended, and he never returned to this country until 1819, except for a temporary purpose at the port of Deal in his passage from one foreign port to another. In 1821, a fresh action was commenced against him in the King's Bench, but, as he avoided arrest, a commission was taken out the same year, upon which he commenced an action of trover for the purpose of trying the validity of it. After the issuing of the commission, but before the trial of the action by him, continuances were regularly entered on the original writs issued in 1812 and 1813 down to the term before the trial.

The continuances may be entered at any time before the trial, even after a commission of bankruptcy issued against the defendant.

The Court held, that at the time of issuing the latter commission there was a valid debt, not barred by the statute, to support the commission, and that the continuances were properly entered.

VI. RELATIVE TO THE EFFECT OF, AS REGARDS THE DEBTOR*.

VII. RELATIVE TO PLEADINGS CONNECTED WITH.

(*a*) DECLARATION.

HAYDON *v.* WILLIAMS, M. T. 1830. C. P. 7 *Bing.* 163; S. C. 4 *M. & P.* 811.

To an action by the assignees of a bankrupt; plea, the Statute of Limitations. To take the case out of the statute the plaintiff called the bankrupt Sutton, who proved, that, in 1823 (within six years of the time the debt was contracted), he received a letter from the defendant, which letter he could not find though he had looked for it every where he could imagine it likely to be; and that in this letter the defendant stated, "that he was unable at the time to pay the money, but that he would pay as soon as he had it in his power to do so."

If an acknowledgment under 9 Geo. 4, be conditional, it must be specially declared on†.

* It is no ground for applying to discharge the defendant out of custody that it appears by the particulars the debt is barred by the statute. (*Merceron* v. *Merceron*, M. T. 1836, B. C., 5 D. P. C. 271). So, the fact of the Statute of Limitations having run since the debt accrued is no ground for setting aside the plaintiff's proceedings. (*Potter* v. *M'Donel*, E. T. 1835, B. C., 3 D. P. C. 583).

† The new purpose need not be declared on specially, unless in the case of executors or administrators. (*Upton* v. *Else*, E. T. 1827, C. P., 12 Moore, 303).

The Court held, that such promise having been conditional, (if of ability), ought, notwithstanding the stat. 9 Geo. 4, c. 14, to have been specially declared on, and also that it was given within six years of the contracting of the debt; evidence of a conditional promise will not support an absolute promise in the declaration.

(*b*) PLEA.

MARGETT *v.* BAYS, H. T. 1836. K. B. 4 *Ad. & E.* 489.

The plea must not use the word "supposed" debt.

DEBT for work and labour. Pleas, 1st, non assumpsit; and 2nd, that the said supposed debt in the said declaration mentioned (if any such there be) did not nor did any part thereof accrue due to the plaintiff within six years before the day of the commencement of the suit. Special demurrer to second plea, shewing for cause that it did not confess and avoid, or traverse or deny, the causes of action.

Lord *Denman*, C. J.—It has been decided that the said supposed cause of action, if any there be, is not a sufficient confession and avoidance, and judgment must therefore be for the plaintiff.

MACHER *v.* BILLING, M. T. 1834. Ex. 1 *C., M. & R.* 577; S. C. 3 *D. P. C.* 246; S. C. 4 *Tyrw.* 810.

The plea must be signed by counsel*.

THE declaration in this action had been delivered October 28th, indorsed to plead in four days. On the 31st, the defendant obtained a week's time to plead, and, on November the 3rd, an order for particulars. On November the 7th, the particulars were delivered, and on the 8th, the defendant delivered a plea of the Statute of Limitations, not signed by counsel. The plaintiff treated this plea as a nullity, and signed judgment on the 10th.

Per Cur.—There was a difference in the practice of the Courts; but the case of *Pepperell* v. *Burrell*, (2 D. P. C. 674), has made the practice now conformable in all the Courts; and it is, that though the plea may be a nullity, the plaintiff cannot sign judgment until the time for pleading has expired. The authority of that decision is confirmed.

WILBY *v.* HENMAN, T. T. 1835. Ex. 4 *Tyrw.* 957.

Under the plea of the general issue, and infra sex annos, the plaintiff must shew that the cause of action arose within six years, or an acknowledgment, under 9 Geo. 4.

DEBT for goods sold and delivered, for money lent, paid, and received, and on an account stated. First plea, the general issue; second, that the causes of action did not accrue within six years. Replication, joining issue on the first plea; and to the second plea, that the causes of action did accrue within six years.

The Court held, that it was imperative on the plaintiff to shew that the debt was either contracted within six years, or that the acknowledgment was such as to take it out of the statute, as required by 9 Geo. 4, c. 14.

* The plea of the Statute of Limitations must conclude with a verification; (*Wheatley* v. *Williams*, E. T. 1836, Ex., 1 M. & W. 533); but where, to an action for work and labour as an attorney, the defendant pleaded non assumpsit infra sex annos, and concluded with a prayer of judgment, omitting the verification:—Held, on special demurrer, that the plea was good. (*Bodenham* v. *Hill*, M. T. 1840, Ex., 8 D. P. C. 862; S. C. 7 M. & W. 274).

(c) Replication.

PLUMMER *v.* WOODBURNE, T. T. 1825. K. B. 4 *B. & C.* 625; S. C. 7 *D. & R.* 25.

THE replication to a plea of the Statute of Limitations, pleaded to the ten first counts of the declaration, averred the absence of the defendant, and his return on a certain day, and that it was his first return after the making of the said several promises in that count mentioned, without adding "each and every of them."

The Court held, on demurrer, that, even if the words of the replication could not be construed distributively, which was by no means clear, the objection could only be specially assigned as a cause of demurrer.

A replication, omitting the words, "each and every of them," after the words, "causes of action," can only be objected to on special demurrer.

VIII. RELATIVE TO EVIDENCE.

DICKENSON *v.* TEAGUE, T. T. 1834. Ex. 1 *C., M. & R.* 241; S. C. 4 *Tyrw.* 450.

UPON the issue, that the cause of action did accrue within six years before the commencement of the suit—

The Court held, that the production of the roll, with regular continuances, was sufficient, notwithstanding an irregularity in the second writ not being tested on the return of the first. The Court could look at the record only, and would not allow it to be contradicted.

The production of the roll is proper evidence.

MOORE *v.* STRONG, H. T. 1835. C. P. 1 *Bing. N. S.* 441; S. C. 1 *Scott*, 367.

IN an action for goods sold and delivered, the defendant pleaded a set-off. The plaintiff replied, that the demand was barred by the Statute of Limitations.

The Court held, that a conversation which took place between the plaintiff and the defendant, at the time of the delivery of the goods for which the action was brought, was admissible in evidence, for the purpose of shewing that the goods were delivered to the defendant by way of satisfaction for his claim.

A conversation with respect to a debt barred should not be rejected.

IX. RELATIVE TO WITNESSES.

WYLDE *v.* PORTER, H. T. 1834. K. B. 1 *Ad. & E.* 742.

THE defendant, who had signed a note as surety jointly with S., was sued alone, and pleaded the Statute of Limitations; to take it out of which, it was proved that a person named S. made payments on account of the note.

The Court held, that a party, not the subscribing witness to the note, could not be admitted to prove that the handwriting of the note was that of the party who made such payments; the subscribing witness could alone be called; and that, in his absence, such evidence was no answer to the plea.

Where there is an indorsement of payments on a document, to which there is a subscribing witness, he must be called to prove the handwriting.

X. RELATIVE TO SCOTLAND AND FOREIGN COUNTRIES.

BRITISH LINEN COMPANY *v.* DRUMMOND, E. T. 1830. K. B. 10 *B.* & *C.* 903.

The time of limitation, in an action on a Scotch obligation, will be regulated by the law of England.

IN an action of debt, it was averred that before the making of the instrument and obligation thereinafter mentioned, the plaintiffs carried on business in Scotland, and that one A. B. and the defendant were resident and domiciled therein; and that by a certain deed and obligation in writing (which was set out), the said A. B. and the defendant became bound, and obliged themselves conjointly and severally to pay to the plaintiffs the sum of 400*l.* sterling. It was then averred that, by the law of Scotland at the time of making such instrument and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the plaintiffs against the defendant upon the instrument, and the cause and right of action accruing thereon, had not yet elapsed, that is to say, by virtue of the said law the plaintiffs had the right and privilege of suing and bringing any action thereon at any time within forty years from the time of making and signing the bond. Plea, that the cause of action did not accrue within six years. Upon demurrer—

The Court held, that the plea was an answer to the action.

HUBER *v.* STEINER, T. T. 1835. C. P. 2 *Bing. N. S.* 202.

The limitation of actions in a foreign country does not apply to an action brought here.

A PLEA of prescription by the law of France omitted the exception in that law, viz. "that the debt is not acknowledged by a separate act of the party charged, in writing:"—Held, that the plea was bad in form, but that such defence being available under the general issue, and the doctrine of prescription applying only ad litis ordinationem, taken from the lex fori where the suit is instituted, and did not prevail in this country, which adopts only that part of the law of foreign courts which affects the rights and merits of the contract, the right of action was only barred in the foreign country, and not in this: the plea therefore of the Statute of Limitations here being avoided by the defendant's absence beyond sea since the cause of action accrued—

The Court held, that the plaintiff was entitled to recover.

London, City of.

REX *v.* LORD MAYOR OF LONDON, T. T. 1834. Ex. 1 *C., M.* & *R.* 1.

Notwithstanding the fine be imposed at Westminster, under charter Hen. 6 and Car. 1, the City of London is entitled to the fine for a mis-

AN indictment for a misdemeanor, committed within the city of London, having been found at the Old Bailey, against Lewis Levy and Mozeley Woolf, was removed by certiorari into the Court of King's Bench. The defendants were tried at the sittings at Guildhall, within the city of London, before Lord *Tenterden*, Lord Chief Justice of the King's Bench, and having been found guilty, were brought up for judgment before the Court of King's Bench, at Westminster, by which Court a fine was imposed upon Levy of 5000*l.*,

and upon Woolf of 10,000*l.* These fines were estreated into the Exchequer. The corporation of London made claim thereto, under the charter 23 Hen. 6 and 14 Car. 1, alleging that Levy and Woolf, when the misdemeanor was committed, and when the fines were imposed, were resident in the city of London. The question whether they were entitled to the fine imposed upon Levy and Woolf coming on to be argued on demurrer—

demeanor committed within the city.

The Court held, that the charter, 23 Henry 6, entitles the city of London to a fine imposed by the Court of King's Bench, sitting at Westminster, on an indictment for a misdemeanor committed within the city, and tried at Nisi Prius by the Chief Justice.

London, Custom of.

See also, ante, tits. *Corporation—Custom.*

Rex *v.* Johnson, M. T. 1836. K. B. 5 *Ad. & E.* 489.

The custom, for the court of the mayor to nominate or reject an alderman, is good.

The custom for the court of mayor and aldermen of London to approve or reject the person nominated by the ward to be alderman, and to elect, if the same person be three times returned by the wardmote, and rejected as unfit by the court of mayor and aldermen—

The Court held reasonable and good; and that the latter custom is not repealed by the 11 Geo. 1, c. 18:—Held, also, that the fitness or unfitness of the party to fill the office having been determined by a court of competent and exclusive jurisdiction, the Judge properly discharged the jury from any finding on that point.

Lord's Act. See tit. *Prisoner.*

Lord's Day.

See also tit. *Bills and Notes.*

Scarfe *v.* Morgan, T. T. 1838. Ex. 4 *M. & W.* 270.

A contract for covering a mare is not invalid because made on a Sunday.

A. sent a mare to B., a farmer, to be covered by a stallion belonging to him. The contract for its performance took place on a Sunday. B. afterwards detained the mare, and refused to deliver her up, unless paid as well the fees due upon that occasion as a certain sum claimed upon their general account.

The Court held, that such a contract was not void within stat. 29 Car. 2, c. 7, s. 1, it not being made by B. in the exercise of his ordinary trade.

Simpson *v.* Nicholls, H. T. 1838. Ex. 6 *D. P. C.* 355; S. C. 3 *M. & W.* 240.

Plea, that the goods were sold

Indebitatus assumpsit for goods sold and delivered, and upon an account stated; plea, that the goods were sold by the plaintiff,

on a Sunday; replication, that the defendant retained the goods, and used them, must shew a promise after such retainer*.

and the contract made by him on a Sunday, in the ordinary way of his trade, contrary to the statute. Replication, that although the goods were sold as in the plea mentioned, yet the defendant kept and retained, and used and consumed the goods, and never returned them. Special demurrer, on the ground that the replication was a departure, and that it did not traverse, or deny, or confess, or avoid the plea, or allege a new promise from the retaining of the goods.

The Court held, that the replication was bad, as it did not allege any new promise, arising from the retaining and using of the goods.

Lunatic†.

See tits. *Commitment—Distringas—Fines of Land—Poor—Process*.

BAXTER *v.* EARL OF PORTSMOUTH, H. T. 1826. K. B. 5 *B. & C.* 170; S. C. 2 *C. & P.* 178.

The value of goods suitable to a lunatic's station, who appears sane, may be recovered, although a committee find he was a lunatic before that time‡.

IN an action for goods sold and delivered against a lunatic, it appeared that the goods supplied were necessary and suitable to the party's station in life, and he acting in all the ordinary business and no imposition shewn.

The Court held that the plaintiff was entitled to recover, notwithstanding a commission of lunacy finding the party to have been lunatic long prior to the supply.

* An attorney is not within the 29 Car. 2, c. 71, s. 1, which prohibits certain persons from doing any work of their ordinary calling on the Lord's day. (*Peate* v. *Dickens*, M. T. 1834, Ex., 3 D. P. C. 171; S. C. 1 C., M. & R. 422; S. C. 5 Tyr. 116).

† By 1 & 2 Vict. c. 14, s. 1, recited act, (39 & 40 Geo. 3, c. 94), in part repealed.

Sect. 2. Persons in custody under the repealed provisions of recited act, or hereafter apprehended as insane or dangerous idiots, may be sent to lunatic asylums. Justices may inquire into settlement of lunatics or dangerous idiots, and make order for payment of their maintenance, &c. If settlement cannot be ascertained, nothing herein to prevent relations from taking lunatics under their own care. Appeal.

Sect. 3. Persons proved not to be insane may be liberated.

Sect. 4. Act not to alter laws relating to the discharge of recovered lunatics.

Sect. 5. Act to extend to England and Wales.

Sect. 6. Commencement of act.

Sect. 7. Act may be altered this session. See also 6 Geo. 4, c. 53.

‡ In assumpsit for use and occupation of a house, the defendant being a lunatic, and at the time provided with a sufficient residence:—Held, that if the plaintiff knew that the defendant was at the time insane, and took advantage of it to induce her to enter into the contract, he could not recover. (*Dane* v. *Lady Kirkwall*, M. T. 1838, N. P., 8 C. & P. 679). The wife of a lunatic, who has no committee, has a sufficient implied authority to sue in the name of the lunatic for debts due to him. (*Rock* v. *Slade*, M. T. 1838, Ex., 7 D. P. C. 22).

By the law of Scotland a man of weak intellect may, by an instrument of interdiction, place himself in such a situation as to be incapable of doing any act affecting his estate without the consent of the interdictors named. The Court of Session may also appoint an interim curator bonis, without notice to parties affected, or cognition, or inquest before a jury: where the latter had been appointed subsequent to the execution of such an instrument, and the interdictors had instituted proceedings to recal such appointment, which nevertheless the Court of Session sustained, the House of Lords, after ascertaining the practice, affirmed the judgment below, but without costs. (*Dickson* v. *Graham*, 4 Bligh, 492).

REX *v.* JONES, T. T. 1831. K. B. 2 *B. & Ad.* 611.

Signing the certificate without personally seeing the patient is indictable under 9 Geo. 4, c. 41*.

AN indictment on 9 Geo. 4, c. 41, charging the defendant with having signed a certificate required by the act without having visited and personally examined the patient, an alleged lunatic:—A conviction held proper, although the indictment went on to allege that it was done by the defendant knowingly and with intention to deceive, and the jury negatived such intention; the averment being unnecessary might be rejected as surplusage.

REX *v.* ST. NICHOLAS, LEICESTER, E. T. 1835. K. B. 4 *N. & M.* 624; S. C. 3 *B. & Ad.* 79.

An order under the 9 Geo. 4 must pursue the words of the statute; and justices have no power to make a retrospective order for the maintenance of a lunatic†.

THE 9 Geo. 4, c. 40, s. 38, empowers justices, by an order under their hands and seals, directed to the overseers of the poor, where a person, deemed insane, is chargeable, according to the form in the schedule annexed to the act, "to cause the said poor person to be conveyed to a lunatic asylum," &c. The form annexed recites, "That it appears to the justices, &c., that —— is lunatic, insane, or a dangerous idiot (as the case may be)." By the 44th section, justices are empowered to make the same inquiry as to persons who are not chargeable, who shall be wandering about, and to make an order to the overseers of the parish where such person is found; and if, upon examination, &c., the justices shall be satisfied that such person is so disordered in his senses that it is dangerous for him to be permitted to go abroad, the justices shall inquire into the place of his last legal settlement, and they are to proceed in the same manner as in the case of a person chargeable, &c.

The Court held, that, an order made under the 44th section, which pursued the form given in the schedule, except in stating that the person was a person so disordered in his senses that it was dangerous for him to be permitted to go abroad, was a good order. A retrospective order of maintenance of such person is bad, as to so much as is retrospective.

* A medical man is not justified merely on the statements of relatives to seize and confine a party supposed to be insane, unless satisfied from such statements that it is necessary to prevent immediate injury. In an action by the party for assault and imprisonment:—Held, that the question was, whether there was reasonable and probable cause for the relatives to consider him insane. If access cannot be obtained, the proper course is to apply to the Court having jurisdiction in such matters to have the party taken up that he may be examined. (*Anderson* v. *Burrows*, H. T. 1830, N. P., 4 C. & P. 210).

† Two justices ordered F. C., the wife of R. C., a Scotchman, having no settlement in England, and a lunatic, to be removed from parish A., where she had become chargeable, to parish B., which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made:—Held, that the order was not void on the ground that it would effect the separation of husband and wife, because it was not to be presumed that when it was made the husband was residing in parish A., or was not residing in parish B. (*Rex* v. *Stockton*, T. T. 1838, N. P., 5 B. & Ad. 546). Where the charter granted to a borough sessions, confined to criminal jurisdiction only:—Held, that an appeal nevertheless lay thereto, against an order of two of the borough justices, for the payment of the expenses of removing a lunatic pauper to an asylum. (*Reg.* v. *St. Lawrence, Ludlow*, M. T. 1839, Q. B., 3 P. & D. 155; abridged, tit. *Poor*).

FENNELL *v.* TAIT, M. T. 1834. Ex. 1 *C., M. & R.* 584; S. C. 3 *D. P. C.* 161; S. C. 5 *Tyrw.* 218.

If a lunatic be not dangerous, he may be brought up on a hab. corp. ad testif. *

ON motion for a habeas corpus to bring up a person who was confined in a lunatic asylum, for the purpose of producing him as a a witness.

Parke, B.—You may have a writ by applying to a Judge at chambers, upon an affidavit that he is in a fit state to be removed, and is not a dangerous lunatic.

REG. *v.* GOODE, T. T. 1837. K. B. 7 *Ad. & E.* 536.

On an indictment the jury may decide on the sanity without witnesses.

ON an indictment for seditious words, and upon the prisoner's arraignment, an inquest taken whether he was insane or not—

The Court held, that the jury might form their opinion from his demeanor, without calling in the evidence of a medical man, and it was not necessary for him to be asked if he would cross-examine the witnesses, or make any remarks to the jury on the evidence.

Machinery.

REX *v.* ASHTON, M. T. 1831. K. B. 2 *B. & Ad.* 750.

Under 7 & 8 Geo. 4, the word "warp" is sufficient in an indictment for destroying machinery†.

ON an indictment on 7 & 8 Geo. 4, c. 30, s. 3, for damaging warps of linen yarn, with intent to render them useless—

Held, that it was not necessary to allege that they "were prepared for, or employed in carding, spinning, weaving, &c., or otherwise manufacturing goods;" those words referring only to the looms and implements of manufacture mentioned in the latter part of the section, and not to the former part; a warp is in itself something prepared for manufacturing goods.

* On a question whether a person was sane at the time of her executing a certain deed, witnesses cannot be asked whether the sister of the party be not insane. (*Doe* d. *Mather* v. *Whitefoot*, 1838, N. P., 8 C. & P. 270).

† By the 7 & 8 Geo. 4, c. 3, if any person unlawfully and maliciously cut or damage any article containing silk, woollen, linen, or cotton, or any frame-work, knitted piece, stocking, hose or lace, being in the loom or frame, or on any machine, engine, rack, or tenters, or in any process of manufacture; or cut or damage any warp, shute of silk, woollen, linen, or cotton, or any one or more of those materials mixed with each other, or with any other material; or any loom, frame-machine, engine, rack, tackle, or implement employed in carding, spinning, throwing, weaving, frilling, shearing, or otherwise manufacturing such goods or articles; or by force enter any house, shop, building, or place, with intent to commit any of these offences, every such offender shall be guilty of felony, subject to transportaion for any term not less than seven years, or imprisoned, with or without whipping, for not exceeding four years. By sect. 4, destroying thresh-ing or any other machinery than those of the description last mentioned, subjects the offender to transportation for seven years, or imprisonment, with or without whipping (since abolished), for two years.

On an indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 4, for breaking a thresh-ing-machine, the Judge allowed the witness to be asked whether the mob, by whom the machine was broken, did not compel persons to go with them, and then compel each person to give one blow to the machine; and also, whether at the time, when himself and prisoner were forced to join the mob, they did not agree together to run away from the mob the first opportunity. (*Rex* v. *Crutchley*, 1831, N. P., 5 C. & P. 133).

Magistrate. See tit. *Justice of the Peace.*

Maiming. See tit. *Mayhem.*

Maintenance of Suits. See tit. *Champerty.*

Malicious Arrest, Action for.

I. RELATIVE TO WHEN MAINTAINABLE.

(*a*) Of the malice, and want of probable cause, p. 583.

(*b*) Of the arrest, p. 585.

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I. RELATIVE TO WHEN MAINTAINABLE.

(*a*) Of the malice, and want of probable cause.

Stokes *v.* White, T. T. 1834. Ex. 1 *C., M. & R.* 223; S. C. 2 *D. P. C.* 703; S. C. 4 *Tyrw.* 786.

To render a party liable for arresting a privileged person, he must have knowledge of the fact*.

In an action for a malicious arrest, it appeared that the defendant sued out a writ of privilege against a party about to attend a trial, and delivered it to the sheriff to be executed; but it did not appear that the defendant knew that the plaintiff was so attending—

The Court held, that an action could not be maintained for ille-

* An action lies for malicious holding a party to bail, although he is never arrested, but is told that there is a writ out against him, and he goes to the sheriff's office and gives bail. (*Small* v. *Gray*, E. T. 1827, N. P., 2 C. & P. 605). But where the attorney issued writs of ca. sa. into two counties, in one of which the plaintiff having been arrested, and paid the debt and costs, was set at large; he was the next day arrested in the second county, and then detained, and the debt and costs again paid over to the attorney several days after notice of the previous facts:—Held, that, in the absence of proof of such notice before the second arrest, the action for a malicious arrest could not be maintained, nor for the subsequent detention, the jury having negatived malice. (*Lewis* v. *Morris*, M. T. 1824, Ex., 4 Tyrw. 907).

gally procuring him to be arrested, and that mere affirmance was not sufficient; the defendant must be shewn to have had full knowledge at the time of the act being done, and that he ordered it to be done.

SHERIFF *v.* GRESSLY, T. T. 1832. K. B. 4 *B. & Ad.* 338.

And where a defendant is discharged out of custody on the terms of bringing no action, no action for a malicious arrest lies.

AN attorney's bill was referred to taxation by a Judge of the Court of Common Pleas, who directed that the order should not be acted upon till the attorney should have had time to make a motion to that Court. The motion was disposed of, and on the second day afterwards, the client not having proceeded with the taxation, the attorney arrested him for the alleged amount of the bill. A Judge of the Court of King's Bench, on summons, set aside the proceedings, and discharged the defendant out of custody, with costs, ordering the plaintiff also to pay the costs of the summons.

The Court held, that the discharge was right; and that the Court would not review the order as to costs. In discharging the rule for rescinding the Judge's order, it was made a condition that the defendant should not prosecute an action for a malicious arrest. Afterwards the attorney's bill was taxed, and the balance due to him found to be only 369*l.*, he having arrested for 800*l.* The Court, on motion, refused to release the defendant from his undertaking not to prosecute the action.

NORRISH *v.* RICHARDS, T. T. 1835. K. B. 5 *N. & M.* 268; S. C. 3 *Ad. & E.* 733.

The suit is not terminated until after a year;

IN an action on the case for a malicious arrest, the action having been brought in an inferior court and removed by habeas corpus into the King's Bench, but no further proceedings had—

The Court held, that the cause was not out of court until the end of a year after the return of the habeas; and, as it appeared that no search had been made for a declaration after the second term—Held, also, that there was no proof that the suit was determined, and the plaintiff properly nonsuited.

PIERCE *v.* STREET, E. T. 1832. K. B. 3 *B. & Ad.* 397.

and no declaration filed after a year is proof the suit was ended*.

IN an action for a malicious arrest, commenced above a year after the arrest—

The Court held, that no declaration having been filed or delivered was sufficient proof that the suit had been determined.

NICHOLSON *v.* COGHILL, E. T. 1825. K. B. 4 *B. & C.* 21.

Discontinuance is evidence of want of probable cause.

IN an action for a malicious arrest—

The Court held, that the defendant having discontinued the action and paid the costs was evidence to go to a jury of want of probable cause; and that being an act of the party himself, and the grounds for so doing within his own knowledge, the burden of proving a probable cause for the arrest was cast on him, and being unexplained warranted the jury in their verdict against him.

* An action for a malicious arrest cannot be maintained where the former cause was terminated by a stet processus by the consent of the parties. (*Wilkinson* v. *Howell*, H. T. 1830, N. P., 1 M. & M. 495).

(*b*) Of the arrest.

GRAINGER *v.* HILL, M. T. 1837. C. P. 4 *Bing. N. S.* 212; S. C. 3 *Scott*, 561.

An officer stating that defendant must deliver up a document, or he must leave an officer with him, is an arrest*.

IN case for maliciously arresting the plaintiff in order to obtain from him the delivery of a ship's register, which he had mortgaged, and by agreement was to retain the command of the vessel for his own profit, the sheriff's officer having gone to him and told him that unless he delivered the register or found bail he must either take him or leave an officer with him—

The Court held, 1st, that it amounted to an arrest; and 2ndly, that as the demand was not enjoined by the writ, it was an abuse of process of law, and immaterial whether the suit in which the process issued had been determined or not, or whether founded in reasonable and probable cause or not.

II. RELATIVE TO THE PARTIES TO THE ACTION.

JONES *v.* NICHOLLS, E. T. 1829. C. P. 3 *M. & P.* 12.

The plaintiff is responsible for the act of his attorney.

IN an action for a malicious arrest it appeared that the affidavit of debt was made by the defendant, and it was to be inferred from circumstances that he knew of the plaintiff's having been discharged under the Insolvent Act.

The Court held, that he was to be deemed responsible for the acts of his attorney, notwithstanding it was sworn by the latter that the arrest was by his mistake, and without the interference or knowledge of the defendant.

BARRATT *v.* COLLINS, E. T. 1825. C. P. 10 *Moore*, 446.

A joint action will not lie for a malicious arrest.

CASE by two for a malicious arrest, alleging as special damage the imprisonment of both, and the expenses of procuring bail-bonds in order to be released.

The Court held, that, the wrong done to one being no wrong done to the other, the action could not be sustained; but the jury having found a joint damage as to the expenses incurred, the Court, in order to save the expense of another action, directed the postea to be amended and the verdict entered accordingly.

III. RELATIVE TO THE PLEADINGS.

HEYWOOD *v.* COLLINGE, H. T. 1839. Q. B. 1 *P. & D.* 202.

The allegation of malice may

IN case for maliciously arresting, and without reasonable or probable cause, the plaintiff having been discharged out of custody on

* But, where the officer told the plaintiff that he had a warrant against him at the suit of the defendant, and did not touch him, but took his word that he would put in bail, and the plaintiff giving him a small gratuity asked him to go to his attorney and desire him to put in bail, which he did, and bail was put in, *Tenterden*, L. C. J., said, that it was the strong inclination of his opinion that it was not a sufficient arrest to sustain the action for a *malicious* arrest. (*George* v. *Radford*, M. T. 1828, N. P., 1 M. & M. 244; S. C. 3 C. & P. 464).

be general in the declaration*;

a former arrest, without leave of any Judge, by reason of the defendant not having declared in due time.

The Court held, that the action was maintainable, and the declaration disclosing a sufficient cause of action, although the allegation of malice was general. Dub. *Denman*, L. C. J.

SAXON *v.* BROWNE, E. T. 1836. K. B. 1 *N. & P.* 661; S. C. 6 *Ad. & E.* 652.

but the omission of the word "maliciously" is bad after verdict.

THE declaration in case for a malicious arrest only alleged that the defendant wrongfully and injuriously procured the writ to issue without the word "maliciously."

The Court held that word the gist of the action, and bad after verdict; and judgment was arrested.

WATKINS *v.* LEE, T. T. 1839. Ex. 7 *D. P. C.* 498; S. C. 5 *M. & W.* 270.

The plea of not guilty does not deny the termination of the suit†.

IN case for a malicious arrest, the declaration averred that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution thereof, and thereupon it was considered by the Court that the defendant should take nothing by his writ. The defendant pleaded not guilty.

The Court held, that the averment of the discontinuance of the suit was a material allegation, which the defendant should have taken issue upon by his plea; and that, not having done so, the discontinuance was admitted on the record.

IV. RELATIVE TO THE EVIDENCE‡. See also, ante, Div. I.

* In a declaration for a malicious arrest, the termination of the former suit was alleged thus:—"That the defendants did not prosecute their suit, but therein wholly failed and made default, and thereupon it was considered that they should take nothing by their bill, and that their pledges should be in mercy, and the plaintiff go thereof without day, prout patet per recordum:—Held, that this allegation was not proved by the production of a rule to discontinue on payment of costs and the proof of the payment of such costs. (*Webb* v. *Hill*, M. T. 1828, N. P., 1 M. & M. 253; S. C. 3 C. & P. 485). Where, in case for a malicious arrest, the declaration alleges certain facts, "whereupon and whereby the suit was ended and determined," the plaintiff cannot plead any other determination of the suit than the mode stated. The acceptance of the debt and costs in satisfaction of the action under a Judge's order, or a rule of reference, is a sufficient determination of a suit. (*Combe* v. *Capron*, 1834, N. P., 1 M. & Rob. 398). In a declaration for a malicious arrest an allegation that the defendant maliciously caused the plaintiff to be arrested and to be detained in prison until, in order to procure his release, he was forced to procure bail, is not a divisible allegation; and if there was a giving bail proved, but no evidence of any arrest, that is not sufficient. (*Barry* v. *Adamson*, M. T. 1826, N. P., 2 C. & P. 503).

† In an action on the case for maliciously, and without probable cause, refusing to accept debt and costs from a prisoner, evidence of probable cause may be given under the plea of not guilty. (*Houndsfield* v. *Drury*, M. T. 1839, Q. B., 3 P. & D. 127; S. C. 11 Ad. & E. 98).

‡ In considering whether there was probable cause for an arrest, the Judge will not take expressions of general malice into his consideration, as tending to shew a want of probable cause. If, in a declaration for a malicious arrest, it be averred that the plaintiff was arrested, that allegation is satisfied by proof of a detainer. (*Whalley* v. *Pepper*, 1836, N. P., 7 C. & P. 506). In an action for a

V. RELATIVE TO THE DAMAGES*.

VI. RELATIVE TO NEW TRIALS, AND JUDGMENT AS IN CASE OF NONSUIT†.

MITCHELL *v.* JENKINS, M. T. 1833. K. B. 2 *N. & M.* 301; S. C. 5 *B. & Ad.* 588.

If the Judge tells the jury there was malice, a new trial will be granted.

IN an action for a malicious arrest, it appeared that the defendant, knowing and intending to allow the plaintiff a set-off, under a mistake of law arrested him for the whole of his demand; *Taunton*, J., told the jury, that, as there was malice in law, they had only to consider the question of damages.

The Court granted a new trial as for a misdirection: although the jury, from an absence of reasonable and probable cause, may infer malice; yet, as in this form of action they must find both, the question of malice ought to be left to them; and semble, if a party acts from a wrong notion of law, he is not liable in such action.

Malicious Fiat in Bankruptcy.

WHITWORTH *v.* HALL, T. T. 1831. K. B. 2 *B. & Ad.* 695.

The commission must have

IN an action for maliciously suing out a commission of bankruptcy—

malicious arrest, it is not necessary to produce the judgment-roll, in order to prove the averment that the suit was discontinued; but such averment may be supported by proof of a rule to discontinue upon payment of costs, and that the costs were paid. (*Watkins* v. *Lee*, T. T. 1839, Ex., 7 D. P. C. 498). In an action for maliciously holding the plaintiff to bail on a bill:—Held, that whatever was admissible in the action on the bill was also admissible in that action; the judgment in the original action would not be sufficient; the plaintiff was therefore entitled to shew that the defendant, at the time of the action brought, was the holder of the bill as indorsee, after it was once due, and that the bill was a mere accommodation bill, and the defendant, therefore, having no right of action against the plaintiff on it. (*Haddan* v. *Mills*, H. T. 1831, N. P., 4 C. & P. 486). In case for a malicious arrest, in holding to bail the plaintiff, as acceptor of a bill, being of the same name and address, but the wrong party, and who, upon being applied to, denied that it was his acceptance, but it did not appear that the defendant was informed that he so disclaimed the bill:—Held, that there was no sufficient proof of malice to support the action. (*Spencer* v. *Jacob*, M. T. 1828, 1 M. & M. 180). In an action for maliciously, and without the authority of the bail, causing the plaintiff to be rendered in discharge of his bail, it is necessary to prove express malice, as well as want of authority. (*Parker* v. *Weston*, H. T. 1839, C. P., 5 Bing. N. S. 715).

* In case for a malicious arrest:—Held, that the plaintiff was entitled to recover the costs incurred in the suit, and not merely those allowed on taxation; (*Gould* v. *Barrett*, M. T. 1835, N. P., 2 M. & Rob. 171); but, in an action for a malicious arrest, the plaintiff cannot recover damages for the extra costs. (*Webber* v. *Nicholas*, T. T. 1826, N. P., 1 Ry. & M. 419).

† In an action for a malicious arrest, the Court discharged a rule for judgment as in case of a nonsuit, with costs, where the plaintiff shewed that he only forbore proceeding to trial because the defendant had instituted criminal proceedings against him on the charge for which the arrest was made. (*Grey* v. *Hutchins*, H. T. 1835, C. P., 3 D. P. C. 414).

been superseded before action commenced.

The Court held, that, in order to support an action for maliciously suing out a commission of bankruptcy, it must be averred and proved that the commission was superseded before the action was commenced; and although not averred, yet, if it be not proved, the plaintiff must be nonsuited, notwithstanding the defendant might have demurred.

See Matthews v. *Dickinson*, 7 *Taunt. Rep.* 399.

COTTON *v.* JAMES, T. T. 1830. K. B. 1 *B. & Ad.* 128.

If the want of probable cause be shewn, the defendant must rebut it*.

IN an action for maliciously suing out a commission of bankruptcy, the plaintiff, after proving the commission and adjudication, and that it was afterwards superseded by the defendant, proved also that, in an action of trespass by him against the defendant for taking goods, under which the defendant justified as assignee, a verdict was given for plaintiff. He also proved a removal of goods, which, under the circumstances, could not amount to an act of bankruptcy, but which, in the absence of any other, was presumed to have been relied on as the act of bankruptcy.

The Court held, that it was sufficient evidence, on the part of the plaintiff of want of probable cause, to call upon the other party to prove the affirmative.

Malicious Injury†.

Malicious Prosecution.

I. RELATIVE TO WHEN AN ACTION FOR IS MAINTAINABLE, p. 589.

II. RELATIVE TO THE FORM OF ACTION, p. 590.

III. RELATIVE TO THE PLEADINGS.

(*a*) DECLARATION, p. 591.

(*b*) PLEAS, p. 591.

IV. RELATIVE TO THE EVIDENCE.

(*a*) IN GENERAL, p. 591.

(*b*) DETERMINATION OF PROSECUTION, p. 592.

* In an action for maliciously suing out a commission of bankrupt, it is not sufficient to prove merely that the commission was superseded, as a supersedeas may proceed upon strict legal grounds, and does not therefore furnish evidence of the want of probable cause. (*Hay* v. *Weakley*, H. T. 1832, N. P., 5 C. & P. 361).

† The law relating to, consolidated and amended by 7 & 8 Geo. 4, c. 30. See ante, p. 582, and also, ante, tits. *Cattle—Horses.*

Where goods, although complete as to the manufacturing and texture, were still in the process of dyeing:—Held, to be still within the protection of 7 & 8 Geo. 4, c. 30, s. 3, against wilful damage of goods in process of manufacture. (*Rex* v. *Woodhead*, 1836, N. P., 1 M. & Rob. 549).

IV. RELATIVE TO THE EVIDENCE—*continued.*

(*c*) OF THE MALICE, p. 593.

(*d*) OF THE WANT OF PROBABLE CAUSE, p. 593.

V. RELATIVE TO THE COSTS, p. 595.

I. RELATIVE TO WHEN AN ACTION FOR IS MAINTAINABLE.

COHEN *v.* MORGAN, M. T. 1835. K. B. 6 *D. & R.* 8.

To support an action for a malicious charge, malice must be shewn*.

DEFENDANT having lost a bill of exchange, went before a magistrate, and stated the circumstances, of which the justice's clerk, in drawing up the information, took down the substance, but charging, in technical form, that the plaintiff had "feloniously stolen, taken, and carried away;" but the defendant never used any such words, nor was there any thing in his conduct to shew that he was influenced by malice.

The Court held, that the Judge properly directed a nonsuit.

WEST *v.* SMALLWOOD, M. T. 1837. Ex. 3 *M. & W.* 418.

If a justice grants a warrant, thinking he has jurisdiction, no action lies.

IN an action for malicious prosecution—

The Court held, that where the justice has general jurisdiction over the subject-matter, erroneously thinking he has jurisdiction over the particular offence, and grants a warrant, no action lies; aliter, if he acted without any jurisdiction at all.

MELLOR *v.* BADDELEY, E. T. 1834. Ex. 2 *C. & M.* 675; S. C. 4 *Tyrw.* 962; S. C. 6 *C. & P.* 374.

So, where a conviction, and no appeal, the action does not lie.

THIS was an action on the case against the defendant for maliciously, and without probable cause, causing an information to be laid against the plaintiff for trespassing on land in pursuit of game in the day-time, under 1 & 2 Will. 4, c. 32, and thereby causing him to be committed and imprisoned by a justice of the peace. The plaintiff did not appeal against the conviction, pursuant to the 44th section of that statute, but suffered the imprisonment under the conviction. At the trial, *Park*, J., nonsuited the plaintiff, as the plaintiff should have appealed; and—

The Court held, that the action was not maintainable, and the plaintiff was properly nonsuited.

MUSGROVE *v.* NEWELL, E. T. 1836. Ex. 1 *M. & W.* 582; S. C. 1 *T. & G.* 957.

If probable cause once exists, it is not altered by a

IN an action on the case, it appeared from the facts that the defendant had reasonable and probable cause for giving the plaintiff in charge, but persisted in it after an explanation given by the officer,

* A rule obtained for a criminal information, but abandoned, is no bar to an action for a malicious prosecution. (*Caddy* v. *Barlow*, M. T. 1827, K. B., 1 M. & Ry. 275; abridged ante, tit. *Information, Criminal*).

subsequent act*.

and the Judge had directed the jury, that on such explanation the probable cause ceased, and that the only question was whether his subsequent conduct amounted to malice.

The Court held, that such direction was wrong; the original facts remaining unaltered, the reasonable and probable cause could not be taken away by such explanations, and a new trial granted.

DUBOIS *v.* KEATS, H. T. 1840. Q. B. 3 *P. & D.* 306; S. C. 11 *Ad. & E.* 329.

That the defendant was bound over to indict, when it was his own charge, is no answer.

IN case for a malicious prosecution, the declaration stated that the defendant falsely and maliciously, and without any reasonable or probable cause, indicted, and caused and procured to be indicted, the said plaintiff, &c., and falsely and maliciously prosecuted the said indictment—

The Court held, that the fact of the defendant having been bound by recognizance to prefer the indictment, was no answer to this declaration; but that the jury might consider all the circumstances attending the original charge—the apprehension and the taking the party before a magistrate, as tending to shew whether the prosecutor was actuated by malice or not, although none of those earlier proceedings were stated upon the record as part of the complaint.

II. RELATIVE TO THE FORM OF ACTION.

WEST *v.* SMALLWOOD, M. T. 1837. Ex. 3 *M. & W.* 418.

Trespass does not lie for a malicious prosecution,

IN an action (malicious prosecution) it appeared that the defendant, on a dispute upon a building contract with the plaintiff, went before a justice, who issued a warrant, under 4 Geo. 4, c. 34, and the complaint was afterwards heard and dismissed.

The Court held, that the defendant could not be liable in trespass, but only in case if actuated by malice.

HENSWORTH *v.* FOWKES, H. T. 1833. K. B. 4 *B. & Ad.* 449; S. C. 1 *N. & M.* 321.

or malicious charge.

IN the declaration acts of trespass and injury to goods were alleged to have happened, after a false and malicious charge of felony against the plaintiff before a justice, and procuring his warrant to a constable to search, &c., who upon such charge committed the acts.

The Court held, that the latter statement was a sufficient allegation, that he entered under the warrant, and that as everything alleged in the count was referable to the warrant, and the acts if done under the warrant would not be the subject of an action of trespass, the count might be joined with one in trover.

* To maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to shew that the charge was taken down in writing, and acted upon by the magistrate; but it is necessary that the jury should be satisfied that it was made to the magistrate with a view to induce him to entertain it as a charge of felony. (*Clarke* v. *Postans*, 1834, N. P., 6 C. & P. 423). If C. be entrusted to receive money for A., with a written direction for its application, and C. write a letter to A., stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C., under the stat. 7 & 8 Geo. 4, c. 29, s. 49, not malicious. (*Edgar* v. *Dyott*, T. T. 1831, N. P., 5 C. & P. 4).

III. RELATIVE TO THE PLEADINGS.

(*a*) Declaration*.

(*b*) Pleas.

Cotton *v.* Brown, E. T. 1835. K. B. 4 *N. & M.* 831; S. C. 3 *Ad. & E.* 312.

In an action on the case for maliciously and without probable cause preferring an indictment against plaintiff. On the plea of not guilty—

Not guilty puts in issue the indictment and probable cause.

The Court held, that the plea puts in issue the indictment, together with the absence of probable cause, and that a plea that the defendant had probable cause for indicting could not be permitted.

Delegal *v.* Highley, H. T. 1837. C. P. 3 *Bing. N. S.* 950.

In action in case for maliciously charging plaintiff before a magistrate without reasonable or probable cause, plea, alleging the several facts out of which the charge arose; but no allegation that the defendant at the time of making the charge knew or had been informed of or acted in any manner on them. On demurrer—

The plea must shew that the defendant acted upon the charge.

The Court held, that the plea could not be sustained.

IV. RELATIVE TO THE EVIDENCE.

(*a*) In general.

Biggs *v.* Clay, E. T. 1834. K. B. 3 *N. & M.* 464.

This was an action for maliciously and without probable cause issuing a warrant, and taking the plaintiff into custody on a charge of felony. It appeared that there was a fire on the premises of the defendant, and that, after the fire, the plaintiff removed some things off the premises, and amongst others a pump-handle. The defendant, from information which he had received, applied for a

The plaintiff need not prove all that occurred before the magistrate†.

* In a declaration for a malicious prosecution, it is not necessary to state that there was an information. It is sufficient to state that the defendant procured a warrant to be issued; but if the declaration state that the defendant made information on oath, and that upon that information the magistrate granted the warrant, the information must be proved in the regular way, and a recital of it in the warrant is not sufficient. (*Gregory* v. *Derby*, 1839, N. P., 8 C. & P. 749). Where, in case for a malicious prosecution, the declaration alleged that an express charge of felony was made against plaintiff, but it appeared that the defendant had only deposed to a suspicion that he had committed it, the Court (dissentiente *Bayley*, J.) held, that it was no variance, it being the only meaning which could be imputed to the accusation made by the defendant. (*Davis* v. *Noake*, E. T. 1817, K. B., 6 M. & S. 29).

† The deposition of a witness, taken in a judicial proceeding in the presence of the party there charged, is not admissible in another proceeding against that party, on the ground that he was present, and had the opportunity of cross-examining. (*Melen* v. *Andrews*, 1829, N. P., 1 M. & M. 336).

In an action for a malicious prosecution for felony, the plaintiff having used

warrant against the plaintiff, charging the plaintiff with stealing this pump-handle; he also obtained a search warrant, when the pump-handle was found on the plaintiff's premises in his absence. Upon the plaintiff's return he was taken before a magistrate, and, in conclusion, was discharged. When the proceedings before the magistrate were given in evidence, what was said by the plaintiff was read, but the depositions of the witnesses were not given in evidence. A verdict passed for the plaintiff.

Lord *Denman*, C. J.—The plaintiff was bound to prove a want of reasonable or probable cause; but we think that he was not bound to produce all the evidence that was given before the magistrate.

PRINCE *v.* SAMO, E. T. 1838. Q. B. 3 *N. & P.* 139.

The plaintiff's statement at the trial of the indictment may be inquired into.

THE plaintiff in an action for a malicious arrest had been examined on an indictment for perjury against a witness in the original action, and, on the cross-examination of a witness in the second action, a part of his statement on the trial of the indictment had been gone into.

The Court held, that, upon the re-examination of the witness, only so much of the remainder of the plaintiff's statement could be inquired into as tended to qualify or explain the statement elicited on the cross-examination.

DAVIS *v.* HARDY, H. T. 1827. K. B. 6 *B. & C.* 225.

If a witness proves a probable cause unimpeached, his credit is not to be left to the jury.

UPON the trial of an action for a malicious prosecution of an indictment without reasonable or probable cause, upon the plaintiff's case none sufficient appeared by the opinion of the Judge, and the defendant called a witness to prove an additional fact, which satisfied the Judge that there was reasonable cause for preferring it.

The Court held, that the witness being unimpeached in his general character, and uncontradicted by testimony on the other side, the Judge was not bound to leave his credit to the jury, but to consider the facts he stated as proved, and to act upon them accordingly; the nonsuit, therefore, was right.

(*b*) DETERMINATION OF PROSECUTION.

BROOK *v.* CARPENTER, M. T. 1825. C. P. 3 *Bing.* 297.

The rule of Court is evidence to shew the determination of the former suit.

IN an action for a malicious detainer on a suit on a bill of exchange—

The Court held, that the rule of Court for staying the proceedings in such suit and delivering up the bill was admissible evidence to shew that the suit had terminated, although such rule had been obtained on the affidavit of the party.

the deponent's deposition before the magistrate:—Held, that the defendant was entitled to use it as evidence in his own favour from the necessity of the case, and as an exception to the rule, but that the deposition of one not a party to the cause could not be so used, as he might be called. (*Jackson* v. *Alison*, M. T. 1835, N. P., 2 M. & Rob. 176).

(*c*) Of the malice.

CADDY *v.* BARLOW, M. T. 1827. K. B. 1 *M. & Ry.* 275.

AN indictment had been preferred by the defendant against the plaintiff and another, and a copy of it obtained on behalf of the latter only. In an action for a malicious prosecution—

The defendant's misconduct is evidence of the malus animus. How the copy of the indictment is obtained the Court will not inquire*.

The Court held, first, that misconduct of the defendant towards the latter was admissible as part of the res gestæ, and tending to shew the malus animus of the defendant; secondly, that the plaintiff was entitled to offer in evidence the copy of the indictment, and the Court would not inquire by what means it had been obtained.

(*c*) Of the want of probable cause.

JAMES *v.* PHELPS, H. T. 1840. Q. B. 3 *P. & D.* 231; S. C. 11 *Ad. & E.* 483.

IN case for maliciously prosecuting the plaintiff for felony, for maliciously obstructing the air-way of a mine, on which he had been acquitted, it having been done bonâ fide under a claim of right—

The probable cause, if depending on facts, is a question for the jury;

The Court held, that the question of probable cause depending on facts was peculiarly a question for the jury, whether the defendant knew that the plaintiff committed the act under a claim of right, and that the Judge ought to have left that question to the jury.

BLACKFORD *v.* DOD, E. T. 1831. K. B. 2 *B. & Ad.* 179.

A PARTY having falsely used the name of the defendants in order to obtain goods, the party defrauded had authorized the plaintiff, his attorney, to write to them to obtain the payment, and he accordingly addressed a letter, threatening immediate proceedings and exposure, and obtained a summons against them to appear before a magistrate on a charge of obtaining goods under false pretences, but the complaint was dismissed, and the defendants afterwards indicted the plaintiff for sending a threatening letter. The plaintiff was, however, acquitted, and then brought the action for having maliciously preferred the indictment.

but if purely a question of law, then the Judge decides it.

The Court held, that there being no fact in dispute, the Judge rightly decided the question of probable cause or not, without leaving it to the jury, it being a pure question of law.

DAVIS *v.* RUSSELL, E. T. 1828. C. P. 5 *Bing.* 354; S. C. 2 *M. & P.* 570.

THE defendant, a constable, acting upon the information of another, corroborated by a supposed intercepted anonymous letter, apprehended the plaintiff at her lodgings at night, without any warrant.

In general the probable cause is a question for the Judge after the facts are found by the jury.

The Court held, 1st, that a constable may arrest without warrant

* A., the servant of B., stated before a magistrate, that C. came into the yard of his employer, and took from a stable there two geldings, the property of B., and rode them away; that he was told that he must not:—Held, that this information did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having feloniously stolen and ridden away with two geldings. (*Milton* v. *Elmore*, M. T. 1830, N. P., 4 C. & P. 456).

upon reasonable suspicion, and that a felony being imputed to a party is a sufficient reason for him to apprehend to prevent an escape, and enter at night to detain the party; 2ndly, that the question of probable cause for the arrest, though a question for the Judge, yet arising from facts to be found by the jury, the direction of the Judge for them to consider whether, looking at the facts, the defendant had reasonable ground to suppose the plaintiff implicated in the felony with which she had been charged, and whether, standing in his place, they would have acted as he had done, was not improper.

M'Donald *v.* Rooke, M. T. 1835. C. P. 2 *Bing. N. S.* 217; S. C. 2 *Scott*, 359.

Where the felony consists partly of a matter of law and fact, the question of probable cause may be left to the jury,

This was an action against the defendant for maliciously and without probable cause charging the plaintiff with the commission of a felony before a justice of the peace. The facts appeared to be these:—The plaintiff had been in the service of the defendant, and upon quitting his house she had taken a hair trunk, a bag, and cloak, alleged to belong to the defendant's family. A letter was written to the plaintiff by the defendant, requiring her to return the articles in question, and at the same time apprizing her, that, if she did not do so by the ensuing Saturday, proceedings of a criminal nature would be instituted against her on the Monday. The plaintiff was not at home when the letter arrived, and on the Saturday she was apprehended, and remained in custody of the officer until Monday, when she was taken before a magistrate and discharged, the prosecution not being pressed further. Upon the trial, Lord *Denman*, C. J., in summing up, told the jury, that they were to say, ay or no, whether there was just and reasonable cause for the conduct of the defendant. They were also to say, ay or no, whether there was malice. A verdict having passed for the plaintiff; damages 50*l.*—

Tindal, C. J.—This comes within a class of cases in which the want and reasonable and probable cause is to be inferred from a long chain of evidence, referring to the commencement, continuance, and completion of the taking away of the property. The dry question of law is, no doubt, for the Judge; but a question like this, depending on facts, is for the decision of the jury.

Broad *v.* Ham, M. T. 1839. C. P. 5 *Bing. N. S.* 722; S. C. 8 *Scott*, 40.

and the Judge may tell the jury there is some evidence on which they may consider the probable cause.

In an action for malicious prosecution, the facts were such as primâ facie shewed a probable cause for the charge, the charge being accompanied by a demand of money—

The Court held, that the Judge rightly directed the jury that, if from that circumstance the defendant believed that the plaintiff had not committed the felony, it was some evidence on which they might consider whether there was reasonable and probable cause for making the charge.

Venafra *v.* Johnson, T. T. 1833. C. P. 10 *Bing.* 301; S. C. 3 *M. & Scott*, 847; S. C. 6 *C. & P.* 50.

The question is whether the defendant be-

In an action for maliciously charging the plaintiff before a magistrate with menaces, whereby the defendant alleged his life to be in danger—

The Court held, that it ought to have been submitted to the jury whether the defendant believed the charge he made against the plaintiff, or whether it was altogether colourable.

lieved the charge to be colourable.

TAYLOR *v.* WILLIAMS, M. T. 1831. K. B. 2 *B. & Ad.* 845.

THE defendant having preferred an indictment for perjury against the plaintiff, on which the defendant was not a witness, and it was ignored; another was preferred, on which he was a witness, and it was found. At the trial he did not appear, although in court upon a habeas corpus. On a bill of exceptions—

The reason of the non-appearance of the prosecutor of the indictment is a question for the jury.

The Court held, that it was properly left to the jury to determine whether his non-appearance arose from a consciousness that he could give no evidence in support of it, or from any other cause; the motives of a party being only to be ascertained by inference drawn from facts, and upon motives might depend the conclusion whether there was probable cause or not.

WILLIAMS *v.* TAYLOR, M. T. 1830. C. P. 6 *Bing.* 183; S. C. 3 *M. & P.* 350.

FIRST indictment had been ignored without the defendant's evidence, and a second one found on his own testmony, which was kept suspended for three years, and then carried down for trial by the plaintiff, and the defendant did not appear.

Suspending a trial for three years shews a want of probable cause, but the short-hand writer's notes are not evidence.

The Court held, that it was sufficient to throw on the defendant the onus of shewing that there was probable cause:—Held, also, that a short-hand writer's notes of what passed on the trial were not admissible, as the witnesses might themselves have been called.

V. RELATIVE TO THE COSTS.

MURRAY *v.* NICHOLS, E. T. 1831. C. P. 6 *Bing.* 530; S. C. 4 *M. & P.* 280.

IN an action of trespass on the case against several for a malicious prosecution per quod the plaintiff was imprisoned, and a verdict found against some, but the others were acquitted.

The 8 & 9 Will. 3 does not apply to an acquittal in an action for malicious prosecution.

The Court held, that it was not within the 8 & 9 Will. 3, c. 11, s. 1, entitling the latter to their costs; by the words, "action for false imprisonment," mentioned in the act, was meant for false imprisonment as the immediate and not consequential injury.

Mandamus.

I. RELATIVE TO WHETHER IT IS OR IS NOT A WRIT OF COMMON RIGHT, p. 597.

II. RELATIVE TO WHEN IT WILL OR WILL NOT LIE IN GENERAL, p. 597.

III. RELATIVE TO WHEN IT WILL OR WILL NOT LIE IN PARTICULAR INSTANCES.

(*a*) CONCERNING ADMIRALTY, LORDS OF, p. 599.

(*b*) CONCERNING BURIALS, p. 599.

III. RELATIVE TO WHEN IT WILL OR WILL NOT LIE IN PARTICULAR INSTANCES—*continued.*

(*c*) CONCERNING CHURCHWARDENS AND OVERSEERS, p. 599.

(*d*) CONCERNING COMPENSATION, p. 601.

(*e*) CONCERNING COMPANIES, p. 603.

(*f*) CONCERNING COPYHOLDS, p. 604.

(*g*) CONCERNING CORPORATIONS, p. 604.

(*h*) CONCERNING DRAINAGE, p. 608.

(*i*) CONCERNING EAST INDIA COMPANY, p. 608.

(*j*) CONCERNING ECCLESIASTICAL PERSONS, p. 608.

(*k*) CONCERNING EXCISE, COMMISSIONERS OF, p. 610.

(*l*) CONCERNING INFERIOR COURTS, p. 610.

(*m*) CONCERNING INNS OF COURT, p. 610.

(*n*) CONCERNING JUDICIAL COMMITTEE, p. 611.

(*o*) CONCERNING JUSTICES OF THE PEACE AND SESSIONS, p. 611.

(*p*) CONCERNING PARISH CLERK, p. 614.

(*q*) CONCERNING PAVING ACT, p. 614.

(*r*) CONCERNING POOR, GUARDIANS OF, p. 614.

(*s*) CONCERNING RAILWAYS, p. 615.

(*t*) CONCERNING RATES, &c. p. 616.

(*u*) CONCERNING RIVER BANKS, p. 618.

(*v*) CONCERNING SAVING BANKS, p. 618.

(*w*) CONCERNING SEXTONS, p. 619.

(*x*) CONCERNING SURVEYORS, p. 619.

(*y*) CONCERNING TOWN CLERK, p. 619.

(*z*) CONCERNING TREASURER OF COUNTY, p. 619.

(*aa*) CONCERNING TREASURY, LORDS OF, p. 620.

(*bb*) CONCERNING TRINITY HOUSE, p. 621.

(*cc*) CONCERNING TRUSTEES UNDER A LOCAL STATUTE, p. 621.

(*dd*) CONCERNING TURNPIKES, p. 621.

(*ee*) CONCERNING VESTRIES, p. 622.

(*ff*) CONCERNING WITNESSES, EXAMINATION OF, p. 622.

IV. RELATIVE TO THE FORM OF THE WRIT, AND RULE FOR, p. 622.

V. RELATIVE TO A PEREMPTORY MANDAMUS, p. 623.

VI. RELATIVE TO THE EFFECT OF, p. 623.

VII. RELATIVE TO THE RETURN TO THE WRIT, p. 623.

VIII. RELATIVE TO COSTS, p. 626.

IX. RELATIVE TO QUASHING THE WRIT, p. 627.

I. RELATIVE TO WHETHER IT IS OR IS NOT A WRIT OF COMMON RIGHT.

REX *v.* PADDINGTON VESTRY, E. T. 1829. K. B. 9 *B. & C.* 456.

In granting a mandamus the Court has a discretionary power.

A LOCAL act provided, that no road set out and used by the public should be taken to be a parish road, and repaired as such, until certified to have been properly formed and made by two surveyors, one appointed by the freeholder or his lessee, and the other by the vestry.

The Court refused a mandamus to compel the vestry to appoint such surveyor, considering that the appointment would have the effect of burthening the parish with the expense of repair for the benefit of the individual more than of the public. The Court have a discretion in granting or refusing such an application, according to circumstances.

II. RELATIVE TO WHEN IT WILL OR WILL NOT LIE IN GENERAL.

REX *v.* JUSTICES OF MIDDLESEX, T. T. 1835. K. B. 5 *N. & M.* 126; S. C. 2 *Ad. & E.* 606.

Where an action may be brought a mandamus will not lie*;

A LOCAL paving act authorized the commissioners, inter alia, to bring actions for the recovery of rates.

The Court refused a rule for a mandamus to compel justices to issue distress warrants, where doubts were entertained as to the validity of the rates, and which might be tried in an action.

REX *v.* HALLS, E. T. 1835. K. B. 3 *Ad. & E.* 494.

or where the granting it might subject justices to an action.

A LOCAL paving act empowered a committee to make rates, and recover the same by distress, or action, if no sufficient distress found; and a later act gave an unrestricted power of suing for them. On motion for a mandamus—

The Court would not compel justices to issue warrants of distress; there being a reasonable doubt as to the legality of the rates, which would oblige them to do what might subject them to actions of trespass.

* Where a statute does not allow a removal of proceedings by certiorari, the Court will not indirectly bring them under review by a mandamus. (*Rex* v. *Justices of Yorkshire*, T. T. 1834, K. B., 3 N. & M. 802; S. C. 1 Ad. & E. 563). Two circumstances must concur to authorize the issuing of a mandamus—a specific legal right, and the absence of an effectual remedy. If it be doubtful whether there be a remedy, the Court will issue a mandamus. (*Rex* v. *Nottingham Waterworks*, 1 N. & P. 480). A mandamus will not be granted to enforce the general law of the land, if an action will lie; although in some cases it will be granted, even where an indictment may be preferred. (*Ex parte Robins*, H. T. 1839, B. C., 7 D. P. C. 566). So, one writ of mandamus cannot issue at the instance of two persons for the enforcement of separate claims, although they have been successors in the same office in respect of which the claim arises. (*Ex parte Scott*, H. T. 1840, B. C., 8 D. P. C. 328).

REX *v.* JUSTICES OF NOTTINGHAM, T. T. 1835. K. B. 5 *N. & M.* 160; S. C. 3 *Ad. & E.* 500.

To ground a mandamus, there must be a previous application,

THE 4 & 5 Will. 4, c. 48, only compels the justices to examine accounts of the expenditure to be paid out of the county rates in open Court, but does not give the rate-payers a right to interfere there; and an application to inspect the accounts, &c., should be made subsequently, with a view to any question relating thereto. On motion for a mandamus, without any such application made—

The Court refused the writ.

REX *v.* WILTS AND BERKS CANAL COMPANY, T. T. 1835. K. B. 5 *N. & M.* 344; S. C. 3 *Ad. & E.* 477.—S. P. REX *v.* BRECKNOCK CANAL COMPANY, E. T. 1835. K. B. 4 *N. & M.* 871; S. C. 3 *Ad. & E.* 217.

and a positive refusal by the proper parties*.

ON motion for a mandamus—

The Court said, before the Court will grant a mandamus there must be a direct refusal by the proper parties.

REGINA *v.* DEPTFORD PIER COMPANY, H. T. 1839. Q. B. 1 *P. & D.* 128.

Where a condition is to be performed, it must be before a mandamus lies.

A LOCAL pier act provided, that, in case the person to whom compensation should be awarded for the lands taken by the company could not make a good title to the premises, it should be lawful for them to pay the amount into the bank.

The Court held, that before the party could compel the payment into the bank, he must shew that he was unable to deduce a good title; and a mandamus therefore refused.

REGINA *v.* PITT, T. T. 1839. Q. B. 2 *P. & D.* 385.

Where a suit is pending in Chancery the Court will not grant a mandamus†.

A PROCEEDING was pending in Chancery to ascertain the heir of a surviving trustee of copyholds, and to appoint a party to convey or surrender the legal estate to the petitioner under 11 Geo. 4 & 1 Will. 4, c. 60—

The Court, considering that Court a fitter Court, and with full jurisdiction, refused a mandamus to the lord to compel him to accept a surrender.

* The Court refused a mandamus to compel the steward to take a surrender in general terms, as "all the tenements which A. had surrendered on a particular day," although the tenements were particularly stated in such former surrender; and, semble, a custom for the steward to prepare all surrenders in the manor is good. (*Reg.* v. *Blackwall Railway*, E. T. 1841, B. C., 9 D. P. C. 558).

† A dispute arose between the freemen of the new corporation of Beverley and the old corporation with respect to the right of cutting down trees on certain pastures formerly granted to the burgesses of the old corporation of Beverley; and an injunction to restrain the cutting down of the trees having been obtained by the new corporation, a mandamus was granted, at the instance of the freemen, to permit them to inspect the deeds, &c. concerning the pastures in question, and which were in the possession of the new corporation with a view to dissolve the injunction. (*Reg.* v. *Beverley* (*Mayor of*), M. T. 1839, B. C., 8 D. P. C. 140).

REX *v.* MAYOR OF LONDON, H. T. 1833. K. B. 1 *N. & M.* 285.

ON motion for a mandamus—

The Court held, that it was no answer to an application for a mandamus to swear in a party to an office to which he has been a second time elected, that, to a similar application in respect to a former election, a return was made, shewing a sufficient ground for refusing to admit him.

But it is no answer to a mandamus that a prior return shews an officer incompetent.

III. RELATIVE TO WHEN IT WILL OR WILL NOT LIE IN PARTICULAR INSTANCES.

(*a*) CONCERNING ADMIRALTY, LORDS OF.

Ex parte RICKETTS, E. T. 1836. K. B. 6 *N. & M.* 523; S. C. 4 *Ad. & E.* 999.

ON motion for a mandamus to the Lords Commissioners of the Admiralty, commanding them to issue a minute or other authority for the payment to Mrs. Ricketts of the sum of 394*l.*, being the balance of arrears of half pay due to the late Lieut. Bevan, R. N.—

A mandamus does not lie to enforce an officer's half pay at the instance of his executors.

Lord *Denman*, C. J., said, we are of opinion that there is not the least ground for saying that half pay can be so vested in a man's executors under such circumstances as these that they can be entitled to this mandamus.

(*b*) CONCERNING BURIALS*.

(*c*) CONCERNING CHURCHWARDENS AND OVERSEERS.

REX *v.* JUSTICES OF SALOP, M. T. 1832. K. B. 3 *B. & Ad.* 910.

ON motion for a mandamus, it appeared that a parish consisted of three townships in the county of W., and of the township of the borough of H., and several other townships in the county of S.: there were four overseers appointed for the latter division, and two for the former, and each division collected rates and provided for their respective poor:—Held, that the divisions were not to be considered under 13 and 14 Car. 2, c. 12, s. 21, as separate parishes; and circumstances being shewn as to the expediency of a separate appointment of overseers for the borough township of H., the Court granted a mandamus to the justices to appoint two for that township.

A mandamus lies for the appointment of district overseers.

* The Court cannot grant a mandamus to a rector to bury a corpse in a vault, or in any particular part of the churchyard, he having a right to exercise a discretion on the subject. (*Ex parte Blackmore*, T. T. 1830, K. B., 1 B. & Ad. 322; abridged ante, tit. *Burial*).

REX *v.* LICHFIELD AND COVENTRY, T. T. 1835. K. B. 5 *N. & M.* 42.—S. P. *Ex parte* LOWE, T. T. 1835. B. C. 4 *D. P. C.* 15.

The rule is absolute in the first instance for swearing in a churchwarden, if no rival candidate*.

ON motion for a mandamus to the archdeacon of A. to swear in B., who had been elected to the office of churchwarden, it appeared that B. had been duly elected and had attended at the proper time and place to be sworn in when the archdeacon refused to administer the oath.

Per Cur.—The rule is absolute in the first instance, where there is no rival candidate and no reason assigned for the refusal to administer the oath.

REX *v.* CHURCHWARDENS OF ST. SAVIOUR'S, ETC. 1 *N. & P.* 946.

A mandamus lies to compel churchwardens and overseers to make a rate,

UPON a grant of ecclesiastical possessions to the churchwardens, &c. relieving the parishioners from tithes, they were by act of Parliament subsequently empowered to make a rate, not exceeding a certain sum, for the purposes of paying the stipends of the curates, &c. also specified, and that all the residue should be applied to the repairs of the church; a subsequent act placed the vestry in the situation of the former parish officers.

The Court granted a mandamus to the churchwardens, overseers, and inhabitants to call a vestry and make a rate.

REX *v.* JUSTICES OF KENT, H. T. 1829. K. B. 9 *B. & C.* 283.

and to hear a complaint against a rate.

BY a local act an appeal was given to a party aggrieved in respect of any thing done in pursuance thereof to the churchwardens, directors, &c.; and if the party were dissatisfied with their determination, an appeal was given to the quarter sessions. A party having applied to the churchwardens, &c. at a meeting for relief against a rate, who passed a resolution to take no further notice of the complaint—

The Court held, that not having heard the complaint the resolution was not a determination within the act entitling the party to his appeal to the quarter sessions, but the remedy was by mandamus to the churchwardens to hear the complaint against the rate.

REX *v.* CLEAR, M. T. 1825. K. B. 4 *B. & C.* 899; S. C. 6 *D. & R.* 393.

The right to inspect overseers' accounts† under the 1 Geo. 3, is not a mere

ON motion for a mandamus, for the inspection of overseers' accounts, under the 17 Geo. 3, c. 38—

The Court held, that the right to inspect churchwardens' and overseers' accounts, under 17 Geo. 2, c. 38, is not general, but a

* A rule for a mandamus to churchwardens to swear in overseers of the poor granted absolute in the first instance. (*Rex* v. *Churchwardens of Manchester*, T. T. 1839, B. C., 7 D. P. C. 707).

† Where an overseer is rendered incompetent to serve in consequence of a conviction under the 4 & 5 Will. 4, c. 76, s. 97, and an application is made for a mandamus to compel him to deliver up books, &c. belonging to the parish, the conviction must be annexed to the affidavits in support of the rule. (*Rex* v. *Simms*, M. T. 1835, K. B., 4 D. P. C. 294).

mere private right, and the applicant ought to shew some public ground for desiring to inspect them, to entitle himself to the remedy by mandamus; and it is no answer to the application that a penalty is imposed for refusing, which is given, not as a compensation to the party complaining, but to punish the offender, and for the relief of the poor.

private right, but must be on public grounds.

REX *v.* ST. MICHAEL'S, PEMBROKE, H. T. 1836. K. B. 1 *N. & P.* 69.

CHURCHWARDENS had, under 59 Geo. 3, c. 134, s. 40, borrowed a sum for rebuilding, the party agreeing not to take the principal within twenty years—

The Court held, that the churchwardens were compellable to raise not only the interest, but an annual sum equal thereto, as a fund for the repayment of the principal, although the party advancing it could not demand it until the expiration of the twenty years, and (per Lord *Denman*, L. C. J.) the churchwardens might apply it in the interval for the benefit of the parish.

The writ lies to compel churchwardens to raise annually a sum to repay money borrowed to be paid some years afterwards.

REX *v.* BIGHTON OVERSEERS, &c., T. T. 1836. K.B. 1 *N. & P.* 774.

CREDITORS had advanced money to parish officers under 22 Geo. 3, c. 63 (Gilbert's Act)—

The Court held, that the charge created under that act was still in force, and that the provision in the subsequent act 43 Geo. 3, c. 110, requiring the payment of part yearly did not absolve the parish from the liability, although incurred thirty years ago, and no part of the principal paid off, and a mandamus to the parish officers to pay the principal and interest was granted.

The 43 Geo. 3, c. 110, does not repeal the 22 Geo. 3, c. 83, as to money borrowed under that statute.

(*d*) CONCERNING COMPENSATION.

REX *v.* HUNGERFORD MARKET, E. T. 1833. K. B. 1 *N. & M.* 404.

UNDER a local market act, the company were empowered to purchase certain premises, and the act provided that, upon notice to

A mandamus lies to assess compensation*,

* A mandamus lies to compel compensation under a local act by a party aggrieved. (*Rex* v. *Thames and Isis Navigation Company*, H. T. 1838, K. B., 8 Ad. & E. 901, n.). But where two parties had succeeded in the same office, and claimed to enforce the same right of compensation for services—Held, that they could not sue out one writ of mandamus for both. (*Ex parte Scott and Morgan*, H. T. 1840, B. C., 8 D. P. C. 328).

Under the provisions of an act for the formation of a railway company, J. R. had called upon the company to issue a warrant to the sheriff of the county of Lancashire to impanel a jury to assess the damages sustained by him, J. R., and others, in consequence of certain of their premises having been taken for the purposes of the said railway. The company refused to do so, and a rule nisi for a mandamus having been obtained, the Court held, that an objection on behalf of the company, that the said J. R. and others had not entered into the bond pursuant to sect. 72 of the act, was too late on shewing cause against the rule. (*Reg.* v. *North Union Railway Company*, H. T. 1840, B. C., 8 D. P. C. 329).

By 5 & 6 Will. 4, c. 76, the sheriff's court (York) was thrown open to all the attorneys of the superior courts at Westminster, and A. applied under the 66th section of that act for compensation for his loss of office. The Lords of the Treasury made an order for that purpose, but the corporation refused to execute a bond to secure the

the parties interested to send in their claims, in case of non-acceptance of the terms offered by the company, the compensation should be assessed in a particular manner.

The Court held, that the option given to the company to purchase was declared upon giving such notice, and that they were not at liberty afterwards to countermand the notice and rescind the contract, and a mandamus therefore granted to compel the statutory assessment of compensation.

Ex parte FARLOW, E. T. 1831. K. B. 2 *B. & Ad.* 341.

and to summon a jury for a compensation under a local act.

A LOCAL act (Hungerford Market Company) directed compensation to be made to all tenants from year to year, or at will, who should sustain any damage or injury in respect of any interest whatever, for goodwill, &c., which they then enjoyed.

The Court held, that yearly tenants were entitled to compensation, notwithstanding the company, after purchasing the landlord's interest, had determined the tenancy by regular notice, although goodwill might not be a legal interest as against a landlord, and a mandamus granted to summon a jury to assess the damage. But the Court refused the mandamus in cases where under terms of holding the landlord might determine the tenancy in any year upon giving three months' notice, with a stipulation against underletting.

REX *v.* GREENWICH RAILWAY COMPANY, H. T. 1835. K. B. 4 *N. & M.* 458.

But, where the finding is not a nullity, a mandamus will not lie to summon another jury;

A RAILWAY company, entitled to take lands, &c., making compensation for the value and for damages, &c., by a jury who were directed to settle the purchase money and compensation separately and distinctly, and they had taken lands of which a party was possessed, some for a term, and others from year to year, and the jury gave an entire sum as a satisfaction for all losses and damages, except for fixtures, and £— for the fixtures, not being required by the company to separate the value of the leasehold interest from the compensation for crops, &c.

The Court held, that the finding could not be treated as a nullity; it not being the duty of the claimant to attend to the apportionment, and a mandamus to the plaintiff to summon another jury refused.

REX *v.* HUNGERFORD MARKET COMPANY, T. T. 1834. K. B. 3 *N. & M.* 622.

and the owner of a house pulled down by mistake cannot seek

A COMPANY were entitled to purchase certain scheduled houses, and to make compensation to persons damaged or injured by the taking down the buildings to be taken down for the purpose, or otherwise in the execution of the act; and they pulled down a house

payment to A.; A. having obtained a rule nisi for a mandamus to compel them, the Court made the rule absolute. (*Reg.* v. *York* (*Mayor of*), E. T. 1840, B. C., 8 D. P. C. 502). But where the right to compensation under the Municipal Corporation Act (5 & 6 Will. 4, c. 76) is purely nominal, the Court will not grant a mandamus. (*Ex parte Lee*, H. T. 1837, K. B., 2 N. & P. 63), Where the Lords of the Treasury made an order on the town council of a borough to grant compensation to a party, and the town council neglect to comply with the order, the Court of King's Bench will enforce it by mandamus. (*Rex* v. *Bridgewater*, E. T. 1836, K. B., 1 N. & P. 466).

not contained in the schedule, and in so doing injured an adjoining house—

compensation by mandamus*.

The Court held, that the owner of the latter could not enforce any of the powers of the act for obtaining compensation by a mandamus.

REGINA *v.* MAYOR OF SWANSEA, H. T. 1839. Q. B. 3 *P. & D.* 16.

No notice was taken of an application for compensation under 5 & 6 Will. 4, c. 76, as a borough treasurer, and common attorney, within six months after.

But it lies to recompense a borough treasurer under 5 & 6 Will. 4, c. 76.

The Court held, that the claim was to be considered as admitted, although the objection that no such office existed, and that the appointment was made by the steward of the lord might have been sufficient to have justified a refusal of the claim by the corporation, and the mandamus to execute the bond granted.

(*e*) CONCERNING COMPANIES.

REX *v.* WORCESTER CANAL COMPANY, H. T. 1828. K. B. 1 *M. & Ry.* 529.

ON motion for a mandamus to compel a canal company to enter upon their books the probate of the will of a deceased shareholder, such shares being made personal estate by the act, and therefore bona notabilia, as the question as to the effect of the probate might be raised upon the return to the writ—

A mandamus lies to compel a company to make an entry as to shares;

The Court granted the writ.

REGINA *v.* LEEDS CANAL COMPANY, H. T. 1840. Q. B. 3 *P. & D.* 174.

ON motion for a mandamus—

but not after sixty-five years to compel a canal company to enrol a conveyance.

The Court refused a mandamus to compel a canal company to enrol a conveyance of lands purchased by them pursuant to the provisions of the act after a lapse of sixty-five years from the sale, without having been ever required so to do.

REX *v.* ST. KATHARINE DOCK COMPANY, M. T. 1832. K. B. 1 *N. & M.* 121; S. C. 4 *B. & Ad.* 360.

ON motion for a mandamus, it appeared that a local act directed the treasurer to sue and be sued, but that his goods should not be taken in execution—

The directors of a company may be compelled to pay by mandamus;

Held, that the Court would enforce a judgment against him by mandamus, compelling the directors to pay the amount recovered out of the corporate funds.

REX *v.* SCRIVENERS' COMPANY, H. T. 1830. K. B. 10 *B. & C.* 511.

ON motion for a mandamus to the Scriveners' Company, it appeared that the applicant had been a banker's clerk, and employed

but, a mandamus does not

* The Court refused a mandamus to compel a canal company to make compensation for damage to the mill of the applicant, where there had been no express refusal but merely delay in considering the claim. (*Reg.* v. *Wilts and Berks Canal Company*, T. T. 1840, B. C., 8 D. P. C. 623).

lie to the Scriveners' Company to admit a notary, unless the party be duly qualified.

as such until five in the afternoon, had been only engaged in the evenings in the employment of a notary in presenting bills and drawing up protests—

The Court refused a mandamus, and said, in order to entitle a person to be admitted by the Scriveners' Company to enable him to act as a notary public, he must be apprenticed to a notary, who can employ him in the proper business of one.

(*f*) Concerning copyholds.

Regina *v.* Hale, M. T. 1838. Q. B. 9 *Ad. & E.* 339; S. C. 1 *P. & D.* 293.

No mandamus lies to the lord to grant a license to copyholder to demise, &c.*

On motion for a mandamus—

The Court held, a mandamus will not go to compel the lord of a manor to grant a license to a copyholder to demise his copyhold land on his alleged custom that the tenant may demise for three years without license; and that, for license to demise during a longer term, the lord shall have a sum certain for every year of such term.

(*g*) Concerning corporations†. See 1 Will. 4, c. 21.

Rex *v.* Brecknock Canal Company, E. T. 1835. K. B. 4 *N. & M.* 871; S. C. 3 *Ad. & E.* 217.

To ground a mandamus

On motion for a mandamus—

The Court said, they will not call upon a corporation by manda-

* Where it is clear that, by the provisions of the 3 & 4 Will. 4, c. 27, a claimant's title to a copyhold is barred by lapse of time, the Court will not compel the lord by mandamus to admit him. (*Rex* v. *Lord of Manor of Agarsdley*, E. T. 1836, B. C., 5 D. P. C. 19). But a mandamus lies to the steward of a manor to inspect the rolls, although the issue was not joined at the time of granting the rule nisi. (*Rogers* v. *Jones*, M. T. 1825, K. B., 5 D. & R. 484). A rule for a mandamus to the steward of a manor to accept a surrender of copyhold premises to certain uses should make the lord of the manor a party to the rule. (*Reg.* v. *Lord of Manor of Whitford*, T. T. 1839, Q. B., 7 D. P. C. 709). The Court refused a mandamus to compel the steward to take a surrender in general terms, as "all those tenements which A. had surrendered on a particular day," although the tenements were particularly stated in such former surrender; and semble, a custom for the steward to prepare all surrenders in the manor is good. (*Reg.* v. *Lord of Manor of Bishopstoke*, 8 D. P. C. 608). But a mandamus will lie to inspect the rolls by a party interested; but it is not sufficient if the demand be only made by an agent. (*Ex parte Hutt*, T. T. 1839, B. C., 7 D. P. C. 690). The 3 & 4 Will. 4, c. 74, s. 53, (the Act for the Abolition of Fines and Recoveries), only applies to equitable estates of tenants in tail of lands held by copy of court-roll; the Court therefore refused a mandamus to the lord of a manor, commanding him to enter on the court-rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward of the manor was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not enrol the deed by which they were granted. (*Reg.* v. *Lord of Manor of Ingleton*, T. T. 1840, K. B., 8 D. P. C. 693). In applying for a mandamus to the steward of a manor to enrol a deed of disposition, pursuant to 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself if the contents are stated in the affidavit. (*Crosby* v. *Fortescue*, M. T. 1836, B. C., 5 D. P. C. 273).

† A dispute arose between the freemen of the new corporation of Beverley and the old corporation with respect to the right of cutting down trees on certain pastures

mus to perform a duty unless there has been a direct refusal to perform it; where there had been no subsequent application after a refusal to indemnify, rule refused.

there must have been a refusal.

REX *v.* MAYOR OF NORWICH, T. T. 1830. K. B. 1 *B. & Ad.* 310.

A LOCAL act directed that twenty persons should be elected by the mayor, &c. to be guardians of the poor within three calendar months next before 4th May, and that forty-eight others should be elected by the several parishes, and the several persons so elected were to enter upon the office on that day; and there was a proviso, that, in case default should be made in the election of a guardian or guardians, the others might proceed in the execution of the act as fully as if the election of all had taken place.

A mandamus lies to compel an election where the local act is only directory as to the time of election*.

The Court held, that, it being clearly the intention of the legislature that of the entire number of guardians twenty should be elected by the corporation, and if more were elected the purpose of the act would be frustrated, the time of the election fixed by the act was only directory, and a mandamus ought to be granted to compel the election, although the time appointed had elapsed.

REX *v.* ST. LUKE'S, MIDDLESEX, M. T. 1833. K. B. 2 *N. & M.* 464.

IN June, 1833, a vestry meeting was duly convened for the election of twenty-nine new trustees under the 50 Geo. 3 and 2 Will. 4. The vestry appointed Mr. Moreland chairman of the meeting; and from time to time four persons were appointed as tellers to assist the chairman in counting the number of votes for the candidates who might be proposed. Sixty candidates were nominated, and their names were submitted one by one to the vestry, who expressed their wish to elect any such candidate by holding up their hands, except as to the first, upon whose nomination no division took place. The chairman and tellers ascertained the number of hands for each candidate, which was minuted by the vestry-clerk, and immediately announced by the chairman to the vestry before he proceeded to the election of any other candidate. After the opinion of the vestry had been so taken as to all the sixty candidates, twenty-five of the can-

Where tellers at an election by poll cannot agree as to numbers a mandamus lies to complete the election.

formerly granted to the old burgesses of the old corporation of Beverley, and an injunction to restrain the cutting down of the trees having been obtained by the corporation, a mandamus was granted at the instance of the freemen to permit them to inspect the deeds, &c. concerning the pastures in question, and which were in the possession of the new corporation, with a view to dissolve the injunction. (*Reg.* v. *Mayor of Beverley*, M. T. 1839, B. C., 8 D. P. C. 140). But a mandamus does not lie to a corporation to compel them to meet and consider the propriety of removing certain persons on account of non-residence. (*Rex* v. *Mayor of Totnes*, H. T. 1825, K. B., 5 D. & R. 481). So, where a charter is granted to a corporation to hold a court for the trial of causes, the disuse of that court for two hundred years, and the want of funds to hold it, are no answer to a rule for a mandamus commanding them to hold it. (*Rex* v. *Mayor of Wells*, H. T. 1836, B. C., 4 D. P. C. 562).

* So, where an election of a person as a mayor for a year immediately succeeding that during which he has served the office, and which by 9 Anne, c. 20, s. 8, is consequently void, the Court will grant a mandamus to proceed to another election pursuant to 7 Will. 4 & 1 Vict. c. 78, s. 26. (*Reg.* v. *Pembroke Corporation*, H. T. 1840, B. C., 8 D. P. C. 302).

didates signed a requisition to the chairman requiring a ballot or poll on behalf of four candidates who had been in a minority, there having been twenty-nine other candidates who were declared to have had higher numbers. This requisition was read to the vestry; upon which some of the vestry required that the election should be completed by the chairman's announcing the names of the twenty-nine candidates having a majority of votes, which the chairman refused, because a ballot or poll had been demanded. The chairman was then voted out of the chair by a large majority, and quitted it accordingly. The committee then appointed another chairman, and ordered that the vestry clerk should make out a list of the twenty-nine candidates who had the largest number of votes, which being done, twenty-nine candidates, of whom the chairman was one, were declared by him duly chosen. On an application for a mandamus to compel the vestrymen and vestry clerk, first, to enter adjournments of the vestry held on the 18th June; secondly, to proceed to hold a poll; thirdly, to complete the election of twenty-nine trustees—

Per Cur.—If all the tellers had agreed in their results, although there was no formal poll, this would have been a good declaration of the poll; but, as the tellers did not agree, it is impossible for us to say that every individual voter was counted. The mandamus must issue.

REX *v.* M'KAY, M. T. 1825. K. B. 4 *B. & C.* 658.

So, after ouster of a corporate officer, a mandamus lies for a new election*,

AFTER a conviction upon an information for usurping the office of bailiff of S.—

The Court held, that the prosecutor was entitled to a priority of motion for a mandamus to the corporation to proceed to a new election, unless he is guilty of unreasonable delay in making the application.

REX *v.* ST. JAMES'S, CHURCHWARDENS, &c., M. T. 1836. K. B. 5 *Ad. & E.* 391.

or to ascertain the validity of the mode of election.

THE act of 1 Jac. 2, c. 22, creating the parish of St. James out of that of St. Martin's, declared that it should be subject to the laws and statutes then in force as to the election of churchwardens, &c., in like manner as that of St. Martin's was subject to.

The Court held, that the subsequent abandonment by St. Martin's of a custom of questionable legal origin did not bind that of St. James to continue it also; and that the mode of election at the time of the separation was to be deemed as recognized by the act of 1 Jac. 2, and established in St. James's, without reference to its origin, and a mandamus was granted.

REX *v.* WEST LOWE, MAYOR, &c., H. T. 1825. K. B. 3 *B. & C.* 677; S. C. 3 *D. & R.* 414.

To obtain a mandamus to

ON motion for a mandamus, it did not appear that the being inrolled a resident at a court leet of a burgh gave the party any title

* And if a councillor of a corporation be ousted, and another elected in his stead, and such election be merely colourable, a mandamus will go to permit the ousted party to exercise his office, but not to restore him to the office. (*Rex* v *Oxford, Mayor of*, E. T. 1837, K. B., 6 Ad. & E. 349).

to vote at elections for members of Parliament, or that the being merely an inhabitant or householder gave any inchoate right to become a corporator, the usage, in fact, being to elect non-residents as burgesses—

The Court refused the mandamus to the mayor or steward of the burgh to inrol the party applying as a resident or burgess of the borough.

inrol a corporate officer, there must be an inchoate right to be a corporator*.

REGINA *v.* EYE, MAYOR OF, T. T. 1837. Q. B. 8 *Ad. & E.* 670; S. C. 2 *P. & D.* 348.

THE rule nisi for a mandamus to insert a claimant's name on the burgess roll was obtained before the year expired, and the mayor was since dead.

The Court held, first, that they would still make the rule absolute, but in the usual course, and not peremptory in the first instance; and secondly, that it was a sufficient title to be placed on the roll that the party was rated for the whole house which he occupied, although he underlet one room to a weekly tenant; and that a house adjoining another, having one outer entry and common passage and staircase to the bed rooms, but nevertheless capable of distinct occupation, were to be considered distinct houses.

But a mandamus lies to insert burgesses' name on the roll; and if rule nisi be granted before, it will be made absolute after mayor's death.

REX *v.* OXFORD, MAYOR OF, &c., E. T. 1836. K. B. 1 *N. & P.* 474.

J. T., a burgess of Oxford, in 1835, was elected a councillor of the borough of Oxford, and would have continued in office until the year 1838; but in September, 1837, his name was accidentally omitted from the burgess list, and he did not apply to have the omission supplied at the revision of the lists, though he had not lost his qualification. In November, the mayor announced that his office of councillor was vacant, and at the election of new councillors another person was elected into his place.

The Court refused to grant a mandamus to the corporation to restore J. T. to his place of councillor, observing, they were ready to grant a quo warranto if it were applied for, but the rule for a mandamus must be discharged with costs.

However, where a town councillor's name was omitted on the burgess roll of the corporation, and the office was filled by another:—Held, that the remedy was quo warranto, not mandamus.

REX *v.* DERBY, COUNCILLORS OF, T. T. 1837. K. B. 7 *Ad. & E.* 419; S. C. 2 *N. & P.* 589.

ON motion for a mandamus—

The Court refused the writ to compel the swearing in of the opposing candidate where one had been declared elected and admitted a councillor, the office being full in fact, the remedy to try whether full in right was by quo warranto.

In fact, where the office of council is full, no mandamus lies.

* The Court has no power by mandamus to compel the mayor and assessors to insert names of parties on the burgess lists, where expunged upon objection that the payment of the shilling, required by 2 Will. 4, c. 45, s. 56, had not been made. (*Rex v. Hithe, Mayor of, &c.*, E. T. 1836, K. B., 1 N. & P. 239; S. C. 5 Ad. & E. 832).

REGINA *v.* FROST, M. T. 1838. Q. B. 1 *P. & D.* 75.

And one of several freemen claiming against a corporation the same right cannot have a mandamus.

THE rents of premises were claimed by freemen for their exclusive benefit; but the right being also claimed by the corporate council, the defendant had been appointed to receive them until the right was settled—

The Court held, that it was not a subject for a mandamus at the instance of one of the freemen interested in the fund.

(*h*) CONCERNING DRAINAGE.

REX *v.* WHITAKER, T. T. 1829. K. B. 9 *B. & C.* 648.

A mandamus lies with respect to the appointment of assessors under a local drainage act.

A LOCAL drainage act authorized the commissioners to appoint one or more assessors, who were to apportion the sums to be assessed amongst the several parishes, &c., and they had appointed three, who had met, and two agreed to making an apportionment, but the third had refused—

The Court held, that being a matter of public duty and trust, an apportionment by the majority was good; but it was necessary that a majority should also meet, and allowed a mandamus to issue.

(*i*) CONCERNING EAST INDIA COMPANY.

REX *v.* EAST INDIA COMPANY, H. T. 1833. K. B. 1 *N. & M.* 335.

A mandamus lies to the East India Company to transmit a despatch.

THE Board of Directors of the East India Company laid before the Board of Control a draft despatch, headed "Bengal Political Draft," upon which much correspondence took place, and many alterations were made—

The Court held, that they could not afterwards rescind the original order for the despatch, nor allege that its object was not of a civil or military nature; and a mandamus granted compelling the directors to transmit such altered despatch to India.

(*j*) CONCERNING ECCLESIASTICAL PERSONS.

REX *v.* NEALE, E. T. 1835. K. B. 4 *N. & M.* 868.

A mandamus lies where a clerk has been removed for alleged intoxication.

THE sexton had been charged by the vicar with divers acts of intoxication, and was summoned to attend before him to answer the charge. He did not, however, attend, and evidence was given by a gentleman, who stated that, on the occasion of a marriage, Bowles, being in attendance in the church, appeared to be fresh in liquor, and unfit to perform the service with decorum. Upon this evidence the vicar removed Bowles from his office. Contradictory affidavits respecting the conduct of Bowles were sworn. On motion for a mandamus—

Per Lord *Denman*, C. J.—I am by no means prepared to say, that if he had on any single occasion been proved to have misconducted himself through drinking at the church, that would not have

been sufficient cause for removing him; but the only ground on which this charge rests is, that he had been guilty of divers acts of intoxication. I think that the least we can expect is proof of the charge as made. We, sitting here, are to see that these proceedings do not take place without full authority and proof, and that one act of intoxication at least has been distinctly proved. I think therefore that we must call on this gentleman to make a return.

REX *v.* SANDFORD, E. T. 1836. K. B. 1 *N. & P.* 328.

But where "inhabitants" are to vote in the election of a chaplain, a mandamus will not lie to try the meaning of that word.

A CHARTER of Edward 6 granted to the governors of a corporation the right of nominating and appointing, una cum assensu majoris partis inhabitantium of the vill of S., a chaplain to perform divine service in the said vill. In 1741, a decree by the Lord Chancellor had declared the right of voting to be in the inhabitants only paying rates and assessments, and the usage since that decree had been in accordance with it. An election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered, and refused—

The Court refused to grant a mandamus for a new election, as the parties applying for it had made out no case to shew that the term "inhabitants," used in the charter, had a wider signification.

REX *v.* BISHOP OF GLOUCESTER, E. T. 1831. K. B. 2 *B. & Ad.* 158.

So, a mandamus will not lie to compel a bishop to assign reasons why he disapproves of a registrar.

THE registrars of a diocese were entitled by their patent to appoint a deputy, "to be approved of and allowed by the bishop," who if he should not approve of their appointment was entitled to nominate a deputy, and appoint a sufficient salary out of the profits of the office as he should judge meet; the registrars having appointed and signified it to the bishop, he had answered that, "for good and sufficient causes, he dismissed the party," but declined specifying his reasons—

The Court refused a mandamus; having the power of approving or disapproving, it would not call upon him to exercise it in any particular way.

REX *v.* BISHOP OF ELY, E. T. 1828. K. B. 8 *B. & C.* 112; S. C. 2 *M. & Ry.* 127.

A mandamus lies for inspection of bishop's registry of presentations.

ON a rule calling upon the Bishop of Ely to shew cause why a mandamus should not issue, commanding him to allow —— Finch, clerk, to inspect his registry of presentations and institutions—

The Court held, that a bishop's registry of presentations is a public document, and ought to be accessible to every person who has, or can by possibility claim, title to the presentation to a living within his diocese; and it is no ground for refusing inspection, that the bishop is also a claimant, and that the disclosure may affect his title.

(*k*) Concerning excise, commissioners of.

Rex *v.* Commissioners of Customs, T. T. 1836. K. B. 1 *N. & P.* 536; S. C. 5 *Ad. & E.* 380.

A mandamus does not lie to commissioners of customs to restore wrecked goods.

On motion for a mandamus to the Commissioners of the Customs, to restore tobacco claimed as wrecked goods, and upon which the lower rate of duty had been tendered—

The Court refused the writ, as the party, if legally entitled, might maintain an action; and that the granting it would in effect be issuing the writ to the Crown, whose servants the commissioners are.

(*l*) Concerning inferior courts.

Rex *v.* Milverton, Lord of, M. T. 1834. K. B. 3 *Ad. & E.* 284.

A mandamus lies to hold a court leet*;

On motion for a mandamus to the lord of a hundred, to hold a court leet forthwith, to appoint officers, it being doubtful whether any particular time for holding it was limited by any existing charter or prescription, and neither the lord nor his attorney swearing to his belief of it—

The Court granted the writ.

Rex *v.* Hewes, H. T. 1835. K. B. 3 *Ad. & E.* 725.

but does not lie to compel an inferior court to enter a verdict in a particular way.

On motion for a mandamus—

The Court held, that they had no authority to compel an inferior court of criminal jurisdiction to enter a verdict in a particular way. Where the clerk of the peace had entered it as given by the jury, "guilty by mischance," which latter words had been cancelled upon the chairman directing that they must find guilty or not guilty, the Court held they had no authority to interfere.

(*m*) Concerning inns of court.

Rex *v.* The Benchers of Lincoln's Inn, M. T. 1825. K. B. 4 *B. & C.* 855; S. C. 6 *D. & R.* 351.

A mandamus will not lie to compel the benchers of an inn of court to admit a party to be a member;

On motion for a mandamus, it appeared that the applicant had applied to be admitted a member of Lincoln's Inn, but he had received an official letter from the steward, informing him that his application to the society was rejected by the benchers.

Per Cur.—This Court cannot compel the benchers of the society of Lincoln's Inn to admit this individual to be a member of their asso-

* But a mandamus will not lie to the mayor, &c., to hold a court leet for administering the oath of allegiance. (*Rex* v. *Mayor of Maidstone*, M. T. 1825, K. B., 6 D. & R. 334). No mandamus lies to permit the party to have inspection of the records of a court leet, unless good reason is assigned. (*Rex* v. *Mayor of Maidstone*, M. T. 1825, K. B., 6 D. & R. 334). After a judgment in the county court has been set aside, though not at the instance of the parties, the Court will not compel the defendant to issue execution on it. (*Eldridge* v. *Fletcher*, E. T. 1835, B. C., 3 D. P. C. 588).

ciation. A mandamus lies only where the party applying for it has a right to have a particular thing done, and where there is an obligation upon the other party to *do* it. In *The King* v. *The Benchers of Gray's Inn*, Doug. 339, Lord *Mansfield*, speaking of these societies, says, "They are voluntary societies. The very term, 'voluntary society,' imports in it a discretion in the individuals composing it to admit or reject members as they please. It is true that the twelve Judges are the *visitors* of the inns of court, but in that character have jurisdiction only over actually admitted members; but here the Court is called upon to control the society in the admission of their members. Now, as far as the admission of members is concerned, these are *voluntary* societies, not submitting to any government. They may, in their discretion, admit or not, as they please; and this Court has no power to compel them to admit any individual."

REX *v.* ALLEN, H. T. 1834. K. B. 3 *N. & M.* 184.

nor against the principal of Clifford's Inn to appear before one of the four inns of court*.

ON a rule to shew cause why a mandamus should not issue, directing the principal of Clifford's Inn to attend before the Bench of the Inner Temple on such day as they might appoint, and take with him the rules and regulations of the Honorable Society of Clifford's Inn, to enable the said Masters of the Bench to decide upon the validity of his election to the office of principal of that society.

Per Cur.—No examples of the exercise of the jurisdiction claimed have been shewn; and without some authority we cannot call upon Mr. Allen to explain his conduct. We do not say that the benchers have done wrong. Without casting the slightest censure upon the society we think we must discharge this rule.

(*n*) CONCERNING JUDICIAL COMMITTEE.

Ex parte SMYTH, T. T. 1835. K. B. 5 *N. & M.* 145.—S. P. *Ex parte* SMYTH, E. T. 1835. K. B. 4 *N. & M.* 582.

The Court will not interfere by mandamus with the Judicial Committee.

UPON an appeal to the privy-council against a judgment of the Ecclesiastical court, the Judicial Committee reversed the judgment below and retained the cause, directing the parties to appear absolutely.

The Court held, that, under 3 & 4 Will. 4, c. 41, s. 3, the decision of the committee being merely a recommendation to his Majesty for his decision, and their decree not being contrary to the general law of the land, nor manifestly out of their jurisdiction, the Court would not interfere by mandamus.

(*o*) CONCERNING JUSTICES OF THE PEACE AND SESSIONS.

REX *v.* BATEMAN, T. T. 1833. K. B. 4 *B. & Ad.* 553.

No mandamus lies unless the

IN order to found the jurisdiction of justices at a special petty sessions to hear and determine a claim for compensation by felonious

* The Court, considering it had no authority to interfere with the Society of Barnard's Inn, refused a mandamus to compel them to admit an attorney into the society. (*Rex* v. *Barnard's Inn*, 5 Ad. & E. 17).

justices have jurisdiction*;

demolition by rioters, under 7 & 8 Geo. 4, c. 31, s. 8, it must appear that the party or his servant having the care of the property went before a justice within seven days after the commission of the offence, and submitted to the examination and entered into the recognizance prescribed by sect. 3. Where this did not appear by affidavit to have been done, the Court refused a mandamus to the justices to summon such petty sessions.

REX *v.* TWYFORD, M. T. 1836. K. B. 5 *Ad. & E.* 430.—S. P. REX *v.* JUSTICES OF BUCKINGHAMSHIRE, H. T. 1834. K. B. 3 *N. & M.* 68.

nor must their power be doubtful.

JUSTICES convicted a party under 17 Geo. 3, c. 56, and sentenced him to eleven weeks' imprisonment, who gave notice of appeal, but failed to prosecute it.

The Court held, that the convicting justices having power to convict only in case of a recognizance not being given, and the sessions only to imprison in case of the judgment in appeal being confirmed, it was so doubtful whether the justices might afterwards commit in execution, that the Court would not by mandamus compel them.

REX *v.* JUSTICES OF PEMBROKE, E. T. 1831. K. B. 2 *B. & Ad.* 391.—S. P. *Ex parte* INHABITANTS OF JARVIN, M. T. 1840. B. C. 9 *D. P. C.* 120.

A mandamus lies to the sessions to state a case;

ON motion for a mandamus—

The Court held, that, although under circumstances, the Court may grant a mandamus to the sessions to state a case, yet it will

* So, where magistrates from a doubt of their jurisdiction decline giving possession of the premises to a landlord, pursuant to 11 Geo. 2, c. 19, s. 6, the Court will not compel them by mandamus to do so. (*Ex parte Fulder*, E. T. 1840, B. C., 8 D. P. C. 535). And the Court will not grant a rule nisi for a mandamus to compel justices to issue their warrant to levy expenses of cutting a hedge pursuant to 5 & 6 Will. 4, c. 50, s. 65, unless it appears that a demand has been made of the expenses from the person sought to be charged, and that the justices were informed of that demand. (*Ex parte Whitmarsh*, E. T. 1840, B. C., 8 D. P. C. 431). By the 50 Geo. 3, c. 69, s. 1, it is enacted, that churchwardens and overseers shall, within fourteen days after other overseers shall be nominated to succeed them, deliver on oath before two justices an account in writing of all sums received, &c. by them during their year of office, and such justices are authorized and empowered, if they shall so think fit, to examine into the matter of such accounts, and to disallow unfounded and reduce exorbitant items:—Held, that these words rendered it imperative on the justices to examine (and, if necessary, disallow or reduce) the accounts, when objections were made to any part of them by any rated inhabitant at the special sessions. And where the justices had signed and allowed such accounts after verification of them by the churchwardens and overseers, without examining into them, although certain rated inhabitants objected to certain items, the Court granted a mandamus to them to examine and allow the accounts. (*Reg.* v. *Justices of Cambridgeshire*, M. T., 1839, B. C., 8 D. P. C. 89). And where an appeal against a poor-rate is entered, and the appellant does not appear to support his appeal, the sessions still have power to hear the appeal, and make an order for the respondent's costs upon the appellant; and a mandamus granted. (*Rex* v. *Essex*, H. T. 1833, B. C., 1 D. P. C. 539). Where a rule nisi for a mandamus to justices to hear an appeal is discharged, with costs to be paid to the justices by the appellants, the parish which appeared to support the refusal of the justices is not entitled to its costs, although served with the rule nisi, and although the justices did not appear by counsel. (*Rex* v. *Staffordshire*, M. T. 1832, B. C., 1 D. P. C. 507). If certain magistrates attending at special sessions do not take part in a decision of the sessions, they ought not to be brought before the Court of Queen's Bench on an application for a mandamus in respect of that decision. (*Reg.* v. *Justices of Wilts*, T. T. 1840, B. C., 8 D. P. C. 717).

not if it be clear that the proceedings can lead to no result; as where the sessions insisted upon the insertion of a fact, which would be fatal to the party requiring the case.

REX *v.* TUCKER, M. T. 1824. K. B. 3 *B. & C.* 544; S. C. 5 *D. & R.* 434.

or to hear an appeal*.

ON motion for a mandamus, it appeared that justices on a summary proceeding under 3 Geo. 4, c. 33, s. 2, to assess damages under 300*l.*, occasioned by wilful and malicious fire, dismissed the application on the ground that they had no power to grant relief, no riot or tumult having been proved to have existed at the time of the offence being committed:—Held, that under the circumstances it was to be considered as an *act done*, against which an appeal would lie by the 7th section of the act, and a mandamus having issued to the sessions to hear such appeal, the Court refused to quash it.

REX *v.* MINSHULL, H. T. 1833. K. B. 1 *N. & M.* 277.

But a mandamus does not lie to justices to receive evidence which ought not to affect their decision;

UPON an information for selling beer without license, application was made for a mandamus for the admission of certain evidence—

The Court held, that the magistrate properly refused to receive evidence as to the signature of one of the justices to the license produced having been improperly obtained, there being no evidence that it had been obtained by fraud of the party using it, and a magistrate not being bound to admit evidence which ought not to affect his decision.

REX *v.* JUSTICES OF SUFFOLK, T. T. 1835. K. B. 5 *N. & M.* 139.

or to alter a verdict at the sessions†;

ON motion for a mandamus—

The Court refused to interfere with the judgment of the court of quarter sessions, by altering the verdict, on the ground that the verdict amounted to a special finding, and that the chairman ought to have directed a verdict of not guilty, if there was ground to believe the jury meant to acquit. The proper course would be to apply to the secretary of state.

* Where the question in three appeals was exactly the same, and it was agreed that the decision in one should be binding in all, the Court refused a mandamus to the parties to hear and decide the others after they had come to an unanimous decision in the first upon the substantial point, notwithstanding they had, at the instance of counsel, granted a case, not upon any doubt of their own as to the propriety of their decision. (*Rex* v. *Justices of Worcester*, M. T. 1828, K. B., 9 D. & R. 210). Where the appeal was entered and the appellant ready to try, but adjourned at the instance of the respondents:—Held, that it amounted to an agreement that they would be ready to try at the next sessions without notice, and that the sessions were therefore bound to hear it at the next sessions without any notice given, notwithstanding the rule of practice to give ten days' notice of trial, whether of new or respited appeals. (*Rex* v. *Justices of Lindsey*, E. T. 1817, K. B., 6 M. & Selw. 379). The Court will not compel by mandamus a magistrate, after having heard the evidence and refused to convict, to rehear the case or remove the proceedings. (*Ex parte British and Foreign Patent Company*, E. T. 1839, B. C., 7 D. P. C. 614).

† Where a conviction on the game acts, in setting out the evidence, pursued the technical language of the statute, and not the language used by the witnesses, the Court allowed a mandamus to the justices to amend the record. (*Rex* v. *Warnford*, T. T. 1825, K. B., 5 D. & R. 489).

REX *v.* BRODERIP, H. T. 1826. K. B. 5 *B. & C.* 239.

or to enforce a penalty, if the conviction be doubtful;

UPON the construction of 34 Geo. 3, c. 65, s. 5, (giving a general mode of proceeding with respect to penalties on watermen on the Thames), it was doubtful if the conviction must be on oath—

The Court refused a mandamus to a justice to enforce the penalty under such conviction.

Ex parte INHABITANTS OF CALTON DALE, M. T. 1834. K. B. 4 *N. & M.* 312; S. C. *by name, In re* LODGE, 2 *Ad. & E.* 123.

or to compel justices to direct the clerk of the peace to put a bond in suit.

ON motion for a mandamus—

The Court refused a mandamus to compel the justices at sessions to direct the clerk of the peace to put in suit the bond given by the high constable for the due performance of his duty, with the view of reimbursing inhabitants from whom he had improperly collected rates, upon a valuation different from the scale fixed by the justices.

(*p*) CONCERNING PARISH CLERK.

REX *v.* DAVIES, M. T. 1828. K. B. 9 *D. & R.* 234.

A mandamus lies to restore a parish clerk.

ON motion for a mandamus to restore a parish clerk, where he had been hastily dismissed, without having any charges formally made in his presence, or any opportunity of answering them—

The Court granted the writ, leaving the cause of removal to be stated by the minister in his return, when the clerk might answer them.

(*q*) PAVING ACT.

REX *v.* TRECOTHICK, M. T. 1834. K. B. 2 *Ad. & E.* 405.

No mandamus lies unless appeal has been made.

A PARTY assessed by commissioners to a local paving rate omitted to avail himself of his remedy by appeal—

The Court held, that he could not afterwards challenge it, upon an application for a mandamus to justices to issue their warrants of distress.

(*r*) CONCERNING POOR, GUARDIANS OF.

REX *v.* GREAT FARRINGDON, E. T. 1829. K. B. 9 *B. & C.* 541.

A mandamus lies at the instance of a rated parishioner to inspect the accounts of the guardians of the poor*;

ON a rule for a mandamus to the guardians, churchwardens, and overseers of the poor of the parish of A. B., commanding them to allow R. B. Gill, an inhabitant of the parish, and liable and subject to be rated to the rates for the relief of the poor of that parish, to inspect the books of accounts, expenditure, and application of the rates of the said parish, and to take copies thereof and extracts therefrom, at his own costs.

* And where an infant under two months old was deserted at the door of the Foundling Hospital, the Court issued a writ of mandamus, in the first instance, to the directors of the poor of the parish, constituted by a local act, commanding

Per Cur.—We have no doubt that the party is entitled to inspect the books at a reasonable time. Assuming that he has no right to appeal, or that the time for appeal is gone by, he may have other good reason for inspecting the books. He has a right to see what has been done. The rule, therefore, must be made absolute.

REGINA *v.* GUARDIANS OF DOLGELLY, T. T. 1838. Q. B. 3 *N. & P.* 542; S. C. 8 *Ad. & E.* 561.

ON motion for a mandamus—

The Court refused to issue the writ to a board of guardians, commanding them to admit to the office of clerk a party alleging that he had been elected by a majority of good votes. The Court would not thus question the title of the voters.

but does not lie to admit the clerk of guardians of the poor.

(*s*) CONCERNING RAILWAYS. See also ante, Div. (*d*) *Compensation*, p. 601.

REGINA *v.* EASTERN COUNTIES RAILWAY COMPANY, T. T. 1839. Q. B. 2 *P. & D.* 648.

A RAILWAY act, reciting the public benefit by the railway proposed from L. to W., and that the projectors were willing to undertake the work; and by the provisions, the company "were to set out their deviations, and make compulsory purchases by stated periods." Having nearly exhausted their funds, the directors completed the line only to C., and, although the periods allowed were nearly elapsed, had taken no step as to the other part of the line, and had declared that no deviations were necessary.

A mandamus lies to compel a railway company to complete purchases of land*;

The Court, considering it doubtful whether they had any bonâ fide intention to continue the line, made absolute a rule for a mandamus to the company to set out the deviations, and complete the purchases.

REG. *v.* EASTERN COUNTIES RAILWAY COMPANY, T. T. 1840. Q. B. 4 *P. & D.* 46.

THE rule had been absolute for a mandamus to a railway company to proceed to complete their line according to their act of Parliament,

and the completion of the

them to receive the child, although the application was made at the instance of a stranger, who took care of the child from humane motives. (*Ex parte Foundling Hospital*, T. T. 1837, B. C., 5 D. P. C. 722). But where a local statute confers a power of investigating accounts upon auditors, to be annually elected, and to be summoned by the vestry clerk, at certain stated intervals, to audit the accounts, the Court will not grant a mandamus to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts of the past year. (*Rex* v. *St. Giles*, H. T. 1833, B. C., 1 D. P. C. 540). So, where the settlement arose by service under an indenture of apprenticeship, assigned by indorsement, a mandamus for its production, in order to be stamped, refused. (*Rex* v. *Westowe*, E. T. 1836, K. B., 1 N. & P. 222).

* A mandamus will not lie to the London and Birmingham Railway Company, to compel them to carry goods along the railway in carriages belonging to the company; the act of Parliament which empowers the company to construct the railway, and to demand tolls for goods conveyed thereon, not containing any compulsory provision that the company should carry goods. (*Ex parte Robins*, H. T. 1839, B. C., 7 D. P. C. 566).

line according to the project.

on affidavits by which it appeared that the company had no intention to proceed with their works; and the writ which issued in consequence recited that the company had purchased lands from L. to C., but had made no provision for executing the line from C. to Y.; and that A. B. was the owner of land between C. and Y., through which the line in the plan of the company had passed, and that he had required the company to set out the line, and proceed to complete the railway from C. to Y., but the company refused to purchase the lands necessary, &c., or to set out and complete the said line. On a peremptory mandamus commanding the company to complete the railway, &c.—

The Court held that the writ was ill, as it contained no averment that the company had given up their design, or that they were not effecting it with all convenient speed; and the Court made no inference to that effect.

(*t*) Concerning rates, &c.

Reg. *v.* St. Saviour's, Wardens of, &c., H. T. 1838. Q. B. 3 *N. & P.* 126.

A mandamus lies to impose increased rates, and to collect and pay away the same.

By a royal grant (Jac. 1), the rectory was granted to the churchwardens, &c., in trust, "out of the revenue thereof to pay certain stipends to two chaplains, a schoolmaster, and usher;" and by an act the parishioners were afterwards exonerated from all tithes, and in consideration thereof the wardens and overseers, with six inhabitants, were empowered to make a rate yearly, not exceeding a certain sum, out of which they were directed to pay the stipends, and appropriate the surplus to repairs of the church; and a subsequent act, reciting the former enactments, and that the sums allowed to be raised and the revenue of the rectory were inadequate, gave power for raising increased rates, and thereout to pay certain sums in lieu of the sums paid by virtue of the original grant.

The Court held, that a mandamus would lie to compel the imposing and collecting the rate and paying the salaries.

Rex *v.* Justices of Leicester, M. T. 1825. K. B. 4 *B. & C.* 891; S. C. 6 *D. & R.* 370.

A mandamus lies for the inspection of rates or assessments;

Mandamus to the justices of a borough sessions to be permitted to inspect and take copies of the two last rates or assessments made by the two justices, and all orders for the expenditure of the same, and the several orders made thereon, or other proceedings relating thereto, granted on the application of one on behalf of several persons, inhabitants of a parish within the borough, and contributing to such rates; but the application extending to all orders of sessions, rates, &c.—

The Court held it too general, although the Court would mould the rule to suit the justice of the case.

Rex *v.* St. Mary-le-bone Vestry, T. T. 1836. K. B. 5 *Ad. & E.* 268.

but not at common law.

A local act authorized the making rates, but was silent as to inspection by the rate payers, and books of account of parochial

receipts and disbursements were kept under 1 & 2 Vict. c. 60, of which inspection was allowed.

The Court held, that they had not, under any statute or at common law, the power of compelling inspection of the rates made under the local act by mandamus, that statute being silent on the subject.

REX *v.* COMMISSIONERS OF ST. PAUL, SHADWELL, H. T. 1828. K. B. 1 *M. & Ry.* 591.

ON motion for a mandamus—

A mandamus lies to levy a rate.

Per Cur.—We will grant a mandamus to compel commissioners for paving, &c., to levy a rate for the purpose of paying off a debt on the former rates, although the commissioners have been created by a subsequent act reserving former liabilities, and though it directs them to be levied in the name of their clerk.

REX *v.* HALL, H. T. 1835. K. B. 4 *N. & M.* 546.

If clear that the statute gives authority.

ON motion for a mandamus, it appeared that, by a local act, the collectors of rents of premises, the yearly assessments or valuation whereof should be under 30*l.*, were rendered liable to be rated and compellable to pay the rates thereof—

The Court said, it must be taken to be the real and not the assessed value of the premises; and it being doubtful whether the warrant of distress for enforcing payment against them would be legal, the Court refused to compel justices to issue their warrant, by mandamus; in order to compel the issuing a warrant of distress, the Court must see very clearly that the act gives that authority.

REX *v.* JUSTICES OF SOMERSET, H. T. 1835. K. B. 4 *N. & M.* 394.

ON motion for a mandamus—

But it will not lie to compel a distress for a doubtful rate,

The Court held, that where it was doubtful whether a particular district (newly inclosed lands, and never before rated) was liable to be rated, the justices were justified in refusing to issue a warrant of distress; and where the question had not been made the subject of appeal, nor any indemnity offered the justices, the Court refused a mandamus, with costs.

REX *v.* MEREHOUSE, H. T. 1835. K. B. 2 *Ad. & E.* 632.—S. P. REX *v.* MORGAN, H. T. 1835. K. B. 2 *Ad. & E.* 618, n.—S. P. REX *v.* GREAME, H. T. 1835. K. B. 2 *Ad. & E.* 615.

at all events, until after application to the sessions;

UPON application for a mandamus against justices to compel them to issue a distress warrant for highway rates, which were refused on several grounds—

The Court considering it doubtful whether the lands were liable to the rate, and the justices having been threatened with an action and no indemnity offered, and that the proper tribunal to decide upon the legality of the rate, the sessions, had not been resorted to, refused the rule.

REGINA *v.* JUSTICES OF MIDDLESEX, E. T. 1838. Q. B. 1 *P. & D.* 402; S. C. 7 *Ad. & E.* 540.

nor to compel justices to enter continuances with a view of quashing the rate;

ON an appeal against a rate under the Middlesex County Act, (3 Geo. 4, c. 107), the justices confirmed the rate, subject to the opinion of the Court of Queen's Bench on a case. The certiorari directed the justices to send up an order of sessions, "with all things touching the same;" and the Q. B. quashed the order of sessions. The sessions, after such order, were applied to to quash the rate, but refused, as the rate had not been removed into the Court of Queen's Bench, and there was no longer any appeal against it.

The Court refused to grant a mandamus to compel the justices to enter continuances, in order to quash the rate; first, because by so doing, the parties who had been engaged in collecting the rate might be exposed to an action; secondly, because the Court could not compel the sessions to decide in a particular way.

REGINA *v.* JUSTICES OF ST. ALBAN'S, H. T. 1838. Q. B. 1 *P. & D.* 148.

but it lies to enter continuances with a view to an appeal.

THE Parochial Assessment Act, 6 & 7 Will. 4, c. 96, s. 6, enacts, that the decision of the special petty sessions shall be binding, unless notice of appeal be given within fourteen days after the decision, and a recognizance be entered into within five days of such notice before some justice of the peace. Where recognizances were duly entered into within the five days, and a minute of the recognizances was entered in the minute book of the clerk of the peace, but the recognizance itself was not then drawn up and signed by a justice of the peace—

The Court held, that the words of the statute were satisfied; and therefore, where, on appeal to the quarter sessions, the recognizances were produced without the signature of any justice, and it appeared that, by inadvertence, the record had been sent by the clerk of the petty sessions to the clerk of the quarter sessions without such signature, and the sessions quashed the appeal on the ground of the recognizance being invalid; the Court of Queen's Bench issued a mandamus to the quarter sessions to enter continuances, and hear the appeal.

(*u*) CONCERNING RIVER BANKS*.

(*v*) CONCERNING SAVINGS' BANKS.

REGINA *v.* NORTHWICK SAVINGS' BANK, H. T. 1838. Q. B. 9 *Ad. & E.* 728; S. C. 1 *P. & D.* 477.

No mandamus lies to savings'

ON motion for a mandamus to the trustees of a savings' bank to appoint an arbitrator under the 9 Geo. 4, c. 92, s. 45, it appeared

* Where the parties, applying for a mandamus to a party liable ratione tenuræ to repair a river bank, were themselves commissioners of sewers, and might have compelled the party by amercement, the Court refused to interfere. (*Reg.* v. *Gamble*, M. T. 1839, Q. B., 3 P. & D. 122).

that by a rule of the society applicant was prevented from substantiating his claim, by reason of the lapse of time.

Per Cur.—We cannot grant a mandamus to the trustees to do that which we see can lead to no beneficial result to the applicant.

bank where the inquiry can have no result.

(*w*) Concerning sextons.

Rex *v.* Stoke Damarell, H. T. 1836. K. B. 1 *N. & P.* 56.

On motion for a mandamus, it appeared that the rector had appointed the sexton, but there appeared some evidence of a custom for the inhabitants to interfere—

A mandamus does not lie to investigate the appointment of sexton.

The Court refused a mandamus to the churchwardens to call a vestry for the purpose of election where an office is full, and the appointment has been made by a party who by the ordinary course of law has the power; the Court will not, unless in a very strong case, and such appointment is void, grant a mandamus to raise the question, particularly where there is another and more convenient remedy.

(*x*) Concerning surveyors*.

(*y*) Concerning town-clerks†.

(*z*) Concerning treasurer of county.

Regina *v.* Baker, H. T. 1837. K. B. 2 *N. & P.* 375.

Certain fees were claimed by the clerk of the session of gaol delivery of Newgate, in respect of convicts sentenced to hard labour—

A mandamus lies to compel the county treasurer to inquire whether the clerk of the sessions is entitled to certain fees,

The Court held, 1st, that since the 19 Geo. 3, c. 74, they were no longer due, the services required formerly from him being no longer to be performed, and that act containing no provision on that subject; 2ndly, that since 5 Geo. 3, c. 84, which recognised the payment of such fees to him in respect of convicts sentenced to transportation, as had been usually paid the successor of the person in office at the time of the passing of the act, he was not precluded from his right to such fees by his predecessor having forborne, whilst in the office (forty years), from claiming them; and a mandamus to the county treasurer granted, with a view of inquiring as to the usual payment.

Rex *v.* Payn, T. T. 1836. K. B. 1 *N. & P.* 624.

On motion for a mandamus to the county treasurer, to deliver in to the justices at sessions a book of entry, shewing the balance due

and to compel the county

* Where a surveyor of the highways has improperly allowed the time for producing and passing his accounts to elapse, the Court will compel him to produce them by mandamus. (*Rex* v. *Lewis*, H. T. 1833, B. C., 1 D. P. C. 530).

† Where a criminal information had issued against a town-clerk for misconduct in his office, in the election of councillors of the borough, the Court refused a mandamus to compel him to produce the voting papers in his custody, which had been used at the election. (*Rex* v. *Micholetts*, M. T. 1836, K. B., 5 Ad. & E. 376).

treasurer to deliver his book to the clerk of the peace;

to or from the county, and which was passed by the justices, and re-delivered to him—

The Court held, that it was not to be deemed a private book, but that he was bound to deliver it with the other vouchers to the clerk of the peace, and a mandamus was granted.

REX *v.* JEYES, T. T. 1835. K. B. 5 *N. & M.* 101; S. C. 3 *Ad. & E.* 416.

but does not lie to county treasurer to pay witnesses.

A PARTY was bound over to prosecute a misdemeanor within 7 Geo. 4, c. 64, at the sessions, but he preferred his indictment at the assizes, and obtained circuit subpœnas for the witnesses—

The Court held, that the witnesses were clearly entitled to their costs, but, semble, not the prosecutor; and the county treasurer, upon whom the order for the expenses had been made, being the ministerial officer of the justices, and there being a remedy by indictment for disobedience, no mandamus will be granted.

(*aa*) CONCERNING TREASURY, LORDS OF.

REX *v.* LORDS COMMISSIONERS OF THE TREASURY, M. T. 1835. K. B. 5 *N. & M.* 589.

A mandamus lies to the Lords of the Treasury to pay a pension granted by Parliament;

ON motion for a mandamus, it appeared that the Lords of the Treasury had granted a retiring pension, which was afterwards voted by Parliament, and the party was informed that it would be paid on application, but it was afterwards refused to be paid, except on a condition which the commissioners, in point of law, had no right to annex.

The Court held, that like other public officers, having admitted to have received funds for the benefit of another, a mandamus would lie.

REX *v.* LORDS OF THE TREASURY, E. T. 1836. K. B. 6 *N. & M.* 505; S. C. 4 *Ad. & E.* 984.

but does not lie to the Lords of the Treasury for revoking the grant of a pension*,

ON motion for a mandamus, it appeared that the Lords of the Treasury had revoked a minute by which they have granted a superannuation allowance under 3 Geo. 4, c. 113, upon the retirement of the grantee from an office held during the pleasure of the Crown.

Per Cur.—The writ must be refused; the applicant ought to have shewn that there are provisions in the act making it compulsory on the Lords of the Treasury to do that which he requires, but in this he has totally failed. The minute of 1826 was revokable by the Lords of the Treasury on the day after it was made by them. It remains in their discretion to continue or revoke the grant.

REX *v.* LORDS OF THE TREASURY, E. T. 1836. K. B. 6 *N. & M.* 508; S. C. 4 *Ad. & E.* 984.

as they have no power to grant

ON motion for a mandamus—

The Court held, that the Lords of the Treasury or Admiralty

* A mandamus will not lie to the Crown or its servants, strictly as such, commanding it or them to pay over money in its or their possession, in liquidation of the claims on the Crown. (*In re Baron de Bode*, T. T. 1838, B. C., 6 D. P. C. 776).

have no power under 50 Geo. 3, c. 117, and 3 Geo. 4, c. 113, to grant pensions for life to superannuated and retired officers in the public service. They can only recommend to Parliament that a sum be voted to the officer in each year. a permanent pension.

(*bb*) Concerning trinity house*.

(*cc*) Concerning trustees under a local statute.

Rex *v.* St. Pancras Church Trustees, T. T. 1835. K. B. 5 *N. & M.* 219; S. C. 3 *Ad. & E.* 535.

A local church building statute directed that the trustees should levy rates, and the accounts be audited and allowed by the quarter sessions— Where a local statute requires trustees to account at a certain place, it cannot be altered by a mandamus.

The Court held, 1st, that it did not dispense with the obligation to produce their accounts before the auditors of the parish appointed under the General Vestry Act (1 & 2 Will. 4, c. 60); the latter can only hold their meetings for auditing parish accounts in the board room of the vestry; and, 2ndly, that a mandamus to such trustees could not direct them to appear at such time and place as the auditors should appoint, where by the act they were required to appear at a particular place.

(*dd*) Concerning turnpikes.

Rex *v.* Trustees of Cheshunt Turnpike Roads, T. T. 1834. K. B. 5 *B. & Ad.* 439.

By the turnpike acts it appeared that the clerk to the trustees had a lasting and valuable interest in his office, and could not be removed without certain notices and formalities, and the assent of a greater number of trustees than those making the order of appointment— A mandamus lies to admit the clerk of the trustees;

The Court held, that a mandamus lay to admit him.

Regina *v.* Oxford and Witney Road Trustees, T. T. 1840. Q. B. 4 *P. & D.* 154.

On a rule calling upon the trustees of the Oxford and Witney turnpike roads to shew cause why a writ of mandamus should not issue, commanding them to repair, and keep in repair, a certain part of the said road— but no mandamus lies to trustees of turnpike roads to repair.

The Court said, it is quite clear a mandamus will not lie in such a case. The rule must be discharged.

* The corporation of Great Yarmouth has no claim under 5 & 6 Will. 4, c. 49, (local), to compensation, pursuant to 59 Geo. 3, c. 54, s. 9, and 1 & 2 Vict. c. 113, s. 27, for the diminution of duty on foreign vessels importing and exporting commodities into or out of the haven, in consequence of commercial conventions between England and foreign powers, notwithstanding the general language of sect. 128 of the local act, with reference to the previous provisions of that act. (*Reg.* v. *Trinity House Corporation*, E. T. 1841, B. C., 9 D. P. C. 565).

(*ee*) Concerning vestries.

Rex *v.* St. Martin's-in-the-Fields, M. T. 1832. K. B. 3 *B. & Ad.* 907.

A mandamus lies to select a vestry,

A select vestry existed with certain, but not all, the powers intended by 59 Geo. 3, c. 12—

The Court granted a mandamus to compel the parish officers to convene a meeting, with the view of establishing a select vestry under the act, to perform the acts which the existing vestry could not, but not otherwise to interfere with it.

Regina *v.* St. Pancras Vestry, T. T. 1840. Q. B. 4 *P. & D.* 66, *n.*

and, in case of partiality or unfairness, a fresh election*.

By the local act, an initiatory proceeding of appointing inspectors was directed, and it was necessary before the election of a vestryman and auditors could take place—

The Court said, the nomination of inspectors ought to take place at the then meeting, and might, if fairly made, be decided by show of hands; if, however, partiality or unfairness be shewn, a poll might be demanded; and under the circumstances a mandamus issued to compel a fresh election.

(*ff*) Concerning witnesses, examination of†.

IV. RELATIVE TO THE FORM OF WRIT, AND RULE FOR‡.

* It is no ground of objection to a mandamus that a requisition is made on parties in the alternative to do one of these things, if the duty enjoined by act of Parliament forms one of them, and there has been a general refusal to comply with such requisition. (*Reg.* v. *St. Margaret's, Leicester, (select vestry)*, 1 P. & D. 116).

† In an action at the suit of the Crown, the Court has no power to issue a mandamus for the examination of witnesses in India. (*Reg.* v. *Wood*, H. T. 1841, Ex., 9 D. P. C. 310).

‡ If a parish clerk had been deprived of his office, the mandamus to restore him must be directed to the incumbent, and not to the churchwardens. (*Ex parte Cirkett*, H. T. 1835, B. C., 3 D. P. C. 327).

By a rule of M. T. 4 Anne, there must be fourteen days at the least between the teste and return of every original writ of mandamus, if directed to parties residing beyond forty miles from Westminster; and if to parties within forty miles, then eight days. (*Reg.* v. *Holborn Union*, H. T. 1838, Q. B., 7 Ad. & E. 281.)

A rule to shew cause why "one or more" writs of mandamus should not issue, is an improper form of rule. (*Reg.* v. *Bridgenorth (Mayor of)*, H. T. 1839, Q. B., 2 P. & D. 317). In another case, a rule calling on the steward of a copyhold manor to shew cause why a mandamus should not issue, commanding him to accept a surrender of a tenement to certain uses, was discharged on the ground that the lord of the manor was a party interested, and ought to have been called into Court by the rule. (*Reg.* v. *Whiford*, T. T. 1839, B. C., 7 D. P. C. 709). The Court will not grant a rule in the alternative for a mandamus or a quo warranto. (*Rex* v. *Leeds (Mayor of)*, H. T. 1840, Q. B., 11 Ad. & E. 558).

V. RELATIVE TO A PEREMPTORY MANDAMUS.

REX *v.* THAMES AND ISIS COMMISSIONERS, M. T. 1836. K. B. 5 *Ad. & E.* 601.

A peremptory mandamus lies to commissioners of navigation for compensation*;

A PARTY entitled to tolls on a towing path by the old channel of the river, which had been diverted by navigation commissioners, claimed compensation, which they had refused; and on appeal to the sessions an order had been made for a certain sum for the said injury and costs.

The Court held, that the sessions having under the act cognizance and full power to inquire, the Court would not question their finding, nor assume that the inquiry might not be twofold; and a peremptory mandamus awarded:—Held, also, that the refusal of the commissioners was a subject of appeal.

REGINA *v.* EASTERN COUNTIES RAILWAY, T. T. 1840. Q. B. 4 *P. & D.* 46.

but refused where preparations are being made.

ON a mandamus, granted to compel the execution of works according to the provisions of the act, the return questioning the jurisdiction, the Court, not doubting its power to enforce the execution in the absence of any averment that the defendants had given up their design, or had wilfully exercised any injurious preference as to the line, or that they were not proceeding or making due preparations, refused a peremptory mandamus.

VI. RELATIVE TO THE EFFECT OF.

REX *v.* JUSTICES OF LANCASTER, M. T. 1820. K. B. 8 *D. & R.* 708.

After a mandamus until return there cannot be a special case.

AFTER a rule obtained for a mandamus, motion was made to have the matter discussed on a special case—

Sed per Cur.—The Court, after having directed a mandamus, will not suffer the question to be discussed as a special case until a return made to the writ.

VII. RELATIVE TO THE RETURN TO THE WRIT.

REX *v.* ROUND, M. T. 1835. K. B. 5 *N. & M.* 427; S. C. 4 *Ad. & E.* 139.

An evasion in the return will not be inferred†.

BY the writ of mandamus the defendant was commanded to deliver to churchwardens all books, &c.; and the return, after alleging that he had not any at the time of the issuing of the writ, went on

* The Court will not award a peremptory mandamus on part of a record whilst the proceedings on the first mandamus are incomplete. (*Reg.* v. *Baldwin*, M. T. 1839, Q. B., 8 Ad. & E. 947; S. C. 3 P. & D. 124).

† The provisions of 9 Anne, c. 20, as to returns to writs of mandamus, and the proceedings in such returns, and the recovery of damages and costs, extended to all writs of mandamus by 1 Will. 4, c. 21, s. 3. Part of the return made to a

to state, "nor since nor at the time when required by the churchwardens."

The Court held, that the first part being sufficient, the Court would not raise any inference of evasion as to the latter; if there were any intended equivocation or collusion he might be liable to an action for a false return.

REX *v.* WILLIAMS, M. T. 1828. K. B. 8 *B. & C.* 681.

A return, that a churchwarden "was not duly elected," is good*.

To a mandamus to an officer, commanding him to admit and swear a certain person "duly elected" as churchwarden, he returned that the person was "not duly elected."

The Court held the return was good, as the applicant had his remedy by action if the return was false; the use of the word "duly" being considered, not as an assumption of a right to decide the validity of the election, but only as the traverse of a material allegation, upon which the mandamus was founded.

REX *v.* MAYOR OF LONDON, T. T. 1833. K. B. 2 *N. & M.* 126; S. C. 5 *B. & Ad.* 233.

The Court of Aldermen may return that an alderman was not duly elected.

A RETURN to a mandamus to the Court of Aldermen to admit a party elected by majority at a wardmote, stating, that by the custom the Court had the power of rejecting the party returned to them as elected, and that the prosecutor was elected by such wardmote, but that the Court of Aldermen had adjudged that he was not a fit and proper person to entitle him to be admitted and sworn into the office of alderman of the ward, and that he was not duly elected.

The Court held, that such distinct reason of not having been duly elected was sufficient, and a peremptory mandamus refused.

REX *v.* LORD MAYOR OF LONDON, H. T. 1833. K. B. 3 *B. & Ad.* 255; S. C. 1 *N. & M.* 285; *not* S. P.

The mayor may return that he has a discretion in the admission of an alderman.

A RETURN by the mayor and aldermen of London to a mandamus to admit to the office of alderman, that they have a right by custom to examine whether a party elected is, according to their discretion and sound consciences, a fit and qualified person under the statute to perform the acts which the existing vestry could not, but not otherwise to interfere with it.

The Court held the return sufficient.

mandamus may be allowed to be quashed, although such return may have been previously argued on concilium. (*Reg.* v. *North Midland Railway Company*, E. T. 1840, Q. B., 3 P. & D. 622). After a rule to take the return off the file simply refused without deciding whether good or not, the Court allowed a traverse to the return. (*Reg.* v. *Payn*, E. T. 1840, Q. B., 3 P. & D. 623).

* Mandamus to churchwardens to raise a rate to pay principal and interest of money borrowed on the credit of parish and church-rates under the Church Building Acts, 58 Geo. 3, c. 45 and 59 Geo. 3, c. 134. Return, that since the security was given the lender, who was the prosecutor, had become bankrupt. Plea, that the prosecutor had lent the money as trustee for a party named out of the money vested in him as trustee, in which he had no interest except as trustee. On demurrer, assigning for cause that the nature of the trust did not appear:—Held, good. (*Reg.* v. *Brancaster*, E. T. 1837, Q. B., 7 Ad. & E. 458; S. C. 2 N. & P. 580).

REX *v.* LORD MAYOR OF LONDON, H. T. 1829. K. B. 9 *B. & C.* 1.

A RETURN to a mandamus to admit to the office of alderman, alleging that a person was not duly elected, and that a tribunal authorized to decide upon the election had adjudged the election to be void.

A return, that another tribunal is authorized to decide, is not bad, and does not oust the K. B. of its jurisdiction.

The Court held not repugnant, the matters, although distinct from, yet being consistent with, each other; held also, that a custom set out for the mayor and aldermen to inquire into and adjudicate upon elections did not oust the jurisdiction of the Court, and was not a valid answer to the writ; that the election was not invalid on account of the dismissal of two of the poll clerks during the election, nor by the change of person in the office of the mayor.

REGINA *v.* LORD OF THE MANOR OF OLD HALL, T. T. 1839. Q. B. 2 *P. & D.* 515.

RETURN to a mandamus to the lord of the manor to hear a plaint, that he had proceeded in obedience to the writ; that the plaint had been formerly heard, and for certain errors been set aside; and that for the same errors, and others stated, it was adjudged that the plaint had been before rightly set aside:—Held not contradictory, and the return shewing judgment to have been given, the Court had no authority to review it.

A return shewing judgment has been given on a plaint is sufficient.

REX *v.* OUSE BANK COMMISSIONERS, H. T. 1836. K. B. 3 *Ad. & E.* 544.

COMMISSIONERS of drainage, &c., were by a local act directed to apply funds for all such works as should from time to time be deemed necessary, &c., and by a mandamus, reciting that money had been paid by them, they were ordered to proceed forthwith to put the banks in a permanent state, &c. The commissioners returned, that they had from time to time, at all times since the passing of the act hitherto, proceeded to execute all such works as should be or were from time to time deemed necessary, &c., following the language of the act, without alleging that they had done any thing.

A return, merely using the words of the statute, without stating that the thing has been done, is insufficient.

The Court held the return insufficient.

REX *v.* JUSTICES OF LEICESTER, M. T. 1825. K. B. 4 *B. & C.* 891; S. C. 6 *D. & R.* 370.

TO a mandamus, the return was, that no facts had been laid before the justices in support of the application to them, but that the party demanded the same as a matter of right.

Justices cannot return, that no facts were laid before them.

The Court held the return insufficient, and a peremptory mandamus awarded.

REX *v.* LORD OF THE MANOR OF OUNDLE, E. T. 1834. K. B. 3 *N. & M.* 496; S. C. 1 *Ad. & E.* 283.

ON a rule to shew cause why the rule for quashing the return should not be varied by ordering the prosecutor to demur to the return, and the defendant forthwith to join in demurrer, and judg-

If the return be insufficient, the Court will

not compel the prosecutor to demur.

ment thereupon to be entered upon record, that the said return should be quashed for the insufficiency thereof, and a peremptory writ of mandamus awarded.

The Court will not, at the request of the defendant, direct the prosecutor to demur to the return instead of awarding a peremptory mandamus.

REX *v.* PAYNE, H. T. 1838. Q. B. 3 *N. & P.* 165.

The validity of the return cannot be tried on motion*.

A PARTY shewed cause against a rule for a mandamus, calling upon him to deposit certain books with the clerk of the peace, and admitted that he had them, but claimed to keep them. The Court having made the rule absolute, and the writ having issued, alleging that two specified books were in his custody, power, or controul, he returned that he had deposited one, but that, at the day of the teste of the writ, he had not the other in his custody, power, or controul.

The Court refused a motion to order this return to be taken off the file.

SCALES *v.* KEY, E. T. 1840. Q. B. 3 *P. & D.* 505, *and affirmed in Dom. Pr.*, 6 *Cl. & Fi.* 41; S. C. 11 *Ad. & E.* 819.—S. P. REX *v.* JOHNSON, T. T. 1836. K. B. 6 *N. & M.* 870.

Where a custom is alleged, unless there be evidence of the custom, the Judge will not put it to the jury†.

IN case for a false return to a mandamus to admit an alderman, to which the return made was an immemorial custom for the Court of the mayor and aldermen to determine, in their discretion, whether the party elected was a fit and proper person, and the jury found the custom to have existed from time immemorial down to 1689, the last case of rejection shewn—

The Court held, that the Judge properly refused to put it to the jury to say whether the custom had existed since, there being no evidence of any proceeding whereby the custom could have been legally determined.

VIII. RELATIVE TO COSTS.

REG. *v.* ST. SAVIOUR, WARDENS OF, &c. E. T. 1838. Q. B. 3 *N. & P.* 354.

The party unsuccessfully opposing liable to costs‡.

ON a mandamus—

The Court, in the exercise of the discretion vested in them by 1 Will. 4, c. 21, ordered the parties opposing the execution of the

* Where the return to a mandamus is not frivolous on the face of it, its validity must be argued on a concilium, and not on a rule for quashing the return. (*Reg.* v. *St. Saviour's, Southwark, Wardens, &c.*, 3 Nev. & Per. 126).

† To a mandamus to a rector to restore a parish clerk, the rector returned that the clerk was guilty of acts of intoxication, and therefore he dismissed him. The clerk brought an action for a false return, and in his declaration recited the return, and negatived the allegations contained in it. The rector, by his plea, repeated the charges contained in the return:—Held, that, on these pleadings, the defendant had the right to begin. (*Bowles* v. *Neale*, 1835, N. P., 7 C. & P. 262). Attachment lies against a corporation for not making a return to a peremptory mandamus, although it had only been served on the town-clerk. (*Rex* v. *Fowey, Mayor, &c.*, H. T. 1825, K. B., 5 D. & R. 614).

‡ Where a rule for a mandamus is made absolute, the costs of the application pursuant to 1 Will. 4, c. 21, s. 6, must be made the subject of a separate appli-

writ, the right in dispute being eventually established against them, to pay the costs; and the rule made absolute against all who joined in making the return.

WHYTT *v.* M'INTOSH, E. T. 1828. K. B. 8 *B. & C.* 317; S. C. 2 *M. & Ry.* 133.

On a mandamus to examine witnesses, the costs follow the success of the action.

A MANDAMUS was obtained by the defendant, under the 13 Geo. 3, c. 63, for examining witnesses in India, and the plaintiff cross-examined, but did not examine any witnesses in chief under the mandamus.

The Court having a discretion over the costs, held, that as they had no power to refuse the writ, and the plaintiff was entitled to cross-examine, the Master had properly allowed the plaintiff, who had succeeded in the action, the costs of such cross-examination, under 32 Geo. 3, c. 58.

FAIRLIE *v.* PARKER, T. T. 1828. C. P. 1 *M. & P.* 438.

The plaintiff is not entitled to the costs of a mandamus to examine witnesses, if defendant takes no part.

THE plaintiff had obtained, under 13 Geo. 3, c. 63, a mandamus for the examination of witnesses in India, but the defendant neither joined in the application nor cross-examined the witnesses.

The Court held, that the plaintiff succeeding in the action was not entitled to the costs attending the writ, nor of the office copies of the depositions.

REX *v.* KIRKE, M. T. 1834. K. B. 5 *B. & Ad.* 1089.

Costs may be applied for after writ issued.

ON motion for costs of a mandamus, under 1 Will. 4, c. 21—

The Court held, that the motion might be made after the issuing of the writ; and the Court will refer to the affidavits in support of the original motion for the mandamus, where it is clear that both applications are made by the same party.

IX. RELATIVE TO QUASHING THE WRIT.

REX *v.* ST. KATHERINE DOCK COMPANY, M. T. 1832. K. B. 1 *N. & M.* 121; S. C. 4 *B. & Ad.* 360.

The right to a mandamus may be objected to on motion to quash the return.

ON motion to quash the return to a mandamus—

The Court held, that an objection to the mandamus issuing might be taken on shewing cause against a rule for quashing the return, although more regular to be made when the mandamus is moved for; and it is not necessary that such rule should go into the Crown paper.

cation, and will not be considered by the Court on disposing of the rule. (*Reg.* v. *Justices of Salop*, M. T. 1837, B. C., 6 D. P. C. 28). The 1 Will. 4, c. 21, s. 6, held not to apply to give costs on application for a mandamus, where proceedings had commenced before the act came in force. (*Rex* v. *Wix*, E. T. 1831, K. B., 2 B. & Ad. 197: S. P. *Rex* v. *Hungerford Market Company*, 2 B. & Ad. 204). Where a party, required by law to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is that he shall have costs if the application fails. (*Reg.* v. *Bridgnorth*, E. T. 1839, Q. B., 10 Ad. & E. 66). Where magistrates are present, but take no part in the proceedings, the application against them will be discharged, with costs. (*Reg.* v. *Earl of Radnor*, MS.)

Manor.

See tits. *Common—Copyhold—Game—Mandamus.*

DOE *d.* BECK *v.* HEAKIN, H. T. 1837. K. B. 6 *Ad. & E.* 495.

Holding courts for thirty-five years, and appointing gamekeepers, &c., is primâ facie evidence of a manor.

IN ejectment to recover waste inclosed within ten years, the lessor claimed as devisee under a will, charging the testator's lands with a gross sum, payable to the testator's daughter, the devise being to trustees until the lessor of plaintiff, his son, attained twenty-three, and then to him, subject to the charge.

The Court held, 1st, that parol evidence of holding courts for thirty-five years past, and appointment of gamekeepers by the trustees, was sufficient primâ facie evidence of a manor, and of his being the lord, although no evidence of court rolls and other documents were produced; 2nd, that the Court could not infer that the legal estate was outstanding in the incumbrancer; and, lastly, that as to the encroachment, however at first a license may be presumed, it was sufficiently put an end to by entry and breaking down the inclosure a few days only before action brought.

Manslaughter*.

See 1 Vict. c. 85.

I. RELATIVE TO WHAT AMOUNTS TO.

(*a*) WHETHER MANSLAUGHTER OR MAIMING, p. 629.

(*b*) BY ACCIDENT OR JOKE, p. 629.

(*c*) BY DRIVING, p. 629.

(*d*) BY FIGHTING, p. 629.

(*e*) BY NOT FURNISHING FOOD, &c., p. 630.

(*f*) BY COMPELLING CHILDREN TO WORK WHEN UNABLE, p. 630.

(*g*) BY MEDICAL PRACTITIONERS, p. 630.

(*h*) IN NAVIGATING SHIPS, AND ILL-TREATMENT OF SAILORS, p. 630.

(*i*) IN AVOIDING OR APPREHENDING A THIEF, p. 631.

II. RELATIVE TO THE INDICTMENT, p. 631.

III. RELATIVE TO THE EVIDENCE, p. 631.

IV. RELATIVE TO PUTTING OFF THE TRIAL, p. 632.

V. RELATIVE TO AN ACQUITTAL, p. 632.

* In order to reduce killing of a person to the crime of manslaughter, there must not only be sufficient provocation, but the jury must be satisfied that the fatal blow was given in consequence of that provocation. (*Rex* v. *Kirkham*, 1837, N. P., 8 C. & P. 115).

I. RELATIVE TO WHAT AMOUNTS TO.

(*a*) Whether manslaughter or maiming*.

(*b*) By accident or joke†.

(*c*) By driving‡.

(*d*) By fighting§.

* Where the prisoner on applying for money was refused until he had finished his work, which he then left, and, on his master threatening to send for a constable, armed himself with a knife, and declared that no constable should stop him, and on a constable being desired to take charge of him he stabbed him:—Held, by a majority of the Judges, that, as the arrest would have been illegal, as the prisoner was in a privy where he could not escape, and the waiting to give notice might have enabled the constable to arrest him, it amounted to such provocation as would have made the offence only manslaughter if death had ensued: a conviction for stabbing under Lord Ellenborough's Act was, therefore, wrong. (*Rex* v. *Thompson*, 1825, 1 Moo. C. C. 80).

† If A. and B. be riding fast along a highway, as if racing, and A. ride by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown and killed, this is not manslaughter in A. (*Rex* v. *Mastin*, 1834, N. P., 6 C. & P. 396). So, where the prisoner pushed off the boat of the deceased from his ship, and the latter, in attempting to catch hold of a barge to prevent his own boat drifting, fell into the water, and was drowned:—Held, that it did not amount to manslaughter. (*Rex* v. *Waters*, 1834, O. B., 6 C. & P. 328). But where the prisoner, in anger with her child, threw a piece of iron, which accidentally struck another, and caused death:—Held to amount to manslaughter. (*Rex* v. *Connor*, 1836, C. C. C., 7 C. & P. 438). So, where a lad, as a frolic, without any intention to do any harm to any one, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the carman who was in it, putting in a sack of potatoes, was pitched backward on the stones, and killed:—Held, that the lad was guilty of manslaughter. (*Rex* v. *Sullivan*, 1836, C. C. C., 7 C. & P. 641). So, where an ironfounder having furnished cannons, one of which, being imperfect and returned, he had filled the flaw with lead, and returned it, and upon being fired, it burst and killed a man:—Held to be manslaughter. (*Reg.* v. *Carr*, 1837, C. C. C., 8 C. & P. 163).

‡ If the driver, by racing with another carriage, loses the control of his own horses, and a party is killed by the upsetting of his own carriage, it is manslaughter in the driver. (*Rex* v *Timmins*, 1836, N. P., 7 C. & P. 499). So, a party near sighted, sitting at the bottom of his cart, and driving at the rate of eight or nine miles an hour, in the evening, and going over a person walking in the road:—Held, guilty of such carelessness as to make the offence amount to manslaughter. (*Rex* v. *Grout*, 1834, C. C. C., 6 C. & P. 629).

§ All persons, who, by their presence, encourage a fight from which death ensues to one of the combatants, are guilty of manslaughter, although they neither say nor do any thing; but if the death be caused, not by blows given in the fight itself, but by other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence are not answerable. (*Rex* v. *Murphy*, 1833, O. B., 6 C. & P. 103). So, all struggles in anger, whether by fighting or wrestling, or any other mode, are unlawful, and death occasioned by them is manslaughter at least. (*Rex* v. *Canniff*, 1840, C. C. C., 9 C. & P. 359). If a person, being in possession of a deadly weapon, enter into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually use it, and kill the other, it will be murder; but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter. If he use it to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far back as he can, it will be justifiable homicide. (*Reg.* v. *Smith*, 1837, C. C. C., 8 C. & P. 160). Where there was no evidence of actual or intended violence to the prisoner on the part of the deceased and his com-

(*e*) By not furnishing food, &c.*

(*f*) By compelling children to work when unable†.

(*g*) By medical practitioners‡.

(*h*) In navigating ships, and ill-treatment of sailors§.

panions, who, in a drunken and turbulent state, met the prisoner at night, and who apprehending violence drew a knife and inflicted the wound which occasioned the death:—Held, that there being nothing to shew the killing was necessary in self-defence, it amounted to manslaughter. (*Reg.* v. *Bull*, 1839, C. C. C., 9 C. & P. 22).

* Where the person undertook the care of an aged imbecile person, and by keeping her in a confined and unhealthy place, and by neglect to provide proper food, &c., occasioned her death:—Held, that if the jury were satisfied, from the gross and wilful neglect, the prisoner contemplated the death of the party, he would be guilty of murder; and if guilty of such neglect, although he did not contemplate death, he would be guilty of manslaughter. (*Reg.* v. *Smith*, 1837, C. C. C., 8 C. & P. 153).

† Where a person in loco parentis inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill-treatment, it will not be murder, but only manslaughter, in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness, and was really able to do the quantity of work required. (*Rex* v. *Cheeseman*, 1836, C. C. C., 7 C. & P. 455).

‡ If a person, bonâ fide and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter, and it is immaterial whether the party be a regular or irregular practitioner. (*Rex* v. *Van Butchell*, 1829, N. P., 3 C. & P. 629, overruling the dictum in Coke, 4 Inst. 251). So, a person in the habit of acting as a man midwife tore away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, by means of which the patient died:—Held, that this person was not indictable for manslaughter, unless he was guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. (*Rex* v. *Williamson*, 1807, O. B., 3 C. & P. 635). So, a person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient, occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or gross inattention to his patient's safety. (*Rex* v. *Long*, 1833, O. B., 4 C. & P. 398; S. P., 1831, O. B., Id. 423). But giving a child, whilst in the act of being born, a mortal wound on the head, as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive, and dies thereof, and there is malice, be murder. (*Rex* v. *Simon*, 1832, 1 Moo. C. C. 346). So, a medical man, though duly qualified to practise, yet if, by gross unskilfulness, he occasions death, will be guilty of manslaughter. (*Rex* v. *Spilling*, 1835, N. P., 2 M. & Rob. 107). And where a person grossly ignorant of medicine administers a dangerous remedy to one labouring under disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter. (*Rex* v. *Webb*, 1834, N. P., 1 M. & Rob. 405).

§ The captain and pilot of a steam-boat were both indicted for the manslaughter of a person who was on board of a smack, by running the smack down. The running down was attributed, on the part of the prosecution, to improper steerage of the steam-boat, arising from there not being a man at the bow to keep a look-out at the time of the accident. It was proved that there was a man on the look-out when the vessel started, about an hour previous. According to one witness, the captain and pilot were both on the bridge between the paddle-boxes; according to another the pilot was alone on the paddle-box:—Held, that, under these circumstances, there was not such personal misconduct on the part of either as to make them guilty of felony. (*Rex* v. *Allen*, 1835, C. C. C., 7 C. & P. 153; S. P. *Rex* v. *Green*, 1835, C. C. C., 7 C. & P. 156). Those who navigate the river Thames improperly, either by too much speed, or by negligent con-

(*i*) In avoiding or apprehending a thief*.

II. RELATIVE TO THE INDICTMENT†.

III. RELATIVE TO THE EVIDENCE‡.

duct, are as much liable, if death ensues, as those who cause it on a public highway on land, either by furious driving or by negligent conduct. (*Reg.* v. *Taylor*, 1840, C. C. C., 9 C. & P. 672). In a case of manslaughter against the captain and mate of a vessel, by accelerating the death of a seaman really in ill-health, but whom, they allege, they believe to be a skulker, the question will be, in determining whether it is a slight or an aggravated case, whether the phenomena of the disease were such as would excite the attention of reasonable and humane men; and in such a case, if the deceased be taken on board after he was discharged from an hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman. (*Reg.* v. *Leggett*, 1837, C. C. C., 8 C. & P. 191).

* An indictment for manslaughter charged, that the deceased was on horseback, and that the prisoner struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, which became frightened and threw him, giving him a mortal fracture. The evidence was, that the prisoner struck the deceased with a small stick, and that the latter rode away, and the former rode after him, whereupon the deceased spurred his horse, which then winced, and threw him, whereby he was killed:—Held, that this evidence sufficiently supported the indictment. (*Rex* v. *Hickman*, 1831, N. P., 5 C. & P. 151). If a servant of A. (who is not lord of the manor) find a night poacher on the lands of B., and pursue him with intent to take him, this is such an attempt at an illegal arrest, that, if the poacher shoot the servant with the gun he has in his hand, and kill him, this will be manslaughter only. (*Rex* v. *Davis*, 1837, N. P., 7 C. & P. 785).

† An indictment for manslaughter charged that A. gave to the deceased divers mortal blows at P., in the county of M., and that the deceased languished and died at D., in the county of K., and that the prisoner was then and there aiding in the commission of the felony:—Held, that the indictment was good, and that the word "there" referred to P., in the county of M. (*Rex* v. *Hargrave*, 1831, N. P., 5 C. & P. 170). In an indictment for manslaughter, it is not necessary to allege the causes merely natural which conduced to the death of the party; it is sufficient to allege the act with which the prisoner is charged, if that act accelerated the death. (*Rex* v. *Webb*, 1834, N. P., 1 M. & Rob. 405).

‡ A. was indicted for the manslaughter of B. by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either of a blow with a hammer, or of a push against the lock or key of a door:—Held, that, if it was occasioned by a blow or blows with a hammer, or any other hard substance held in the hand, it was sufficient to support the indictment, but otherwise, if it was the result of a push against the door. (*Rex* v. *Martin*, 1832, O. B., 5 C. & P. 128). The evidence against a prisoner charged with manslaughter was an admission, on his part, that, unfortunately, he was the man who shot the deceased, and the fact, that, on their coming together, apparently not in ill humour, from the South Metropolitan Cemetery, where the prisoner was a watchman, but with which the deceased had no connexion, the prisoner said to the deceased, "Now, you mind, don't let me see you on my premises any more." At the time this was said the wound had been given of which the deceased eventually died:—Held, that, in point of law, the evidence was sufficient to sustain the charge. (*Rex* v. *Morrison*, 1837, C. C. C., 8 C. & P. 22). A. was indicted for the wilful murder of B., and C. was indicted for receiving, harbouring, and assisting A., well knowing that he had committed the felony and murder aforethought:—Held, that if the offence of A. was reduced to manslaughter, C. might, notwithstanding, be found guilty as accessory after the fact. Where it appears that one person's death is occasioned by the hand of another, it is for that other to shew, either by evidence or by inference from the circumstances of the case, that his offence is of a mitigated character, and does not amount to the crime of murder. (*Rex* v. *Greenacre*, 1837, C. C. C., 8 C. & P. 35).

IV. RELATIVE TO PUTTING OFF THE TRIAL*.

V. RELATIVE TO AN ACQUITTAL†.

Map‡.

Maritime Rights. See tit. *Sea-shore.*

Market.

De Rutzen *v.* Lloyd, H. T. 1836. K. B. 5 *Ad. & E.* 456; S. C. 6 *N. & M.* 776.

A grant to hold a market may be presumed.

Upon evidence of a market immemorially holden in a certain place within a manor, by the lord—

The Court held, that a jury may be warranted in finding a grant of it to be held in any convenient place within the manor; and, of course, with the power incident thereto of removal from time to time.

Prince *v.* Lewis, E. T. 1826. K. B. 5 *B. & C.* 363; S. C. 8 *D. & R.* 121; S. C. 2 *C. & P.* 66.

The owner of a market is bound to find sufficient room, as far as it will allow.

The King granted to A. that he, his heirs and assigns, should have and hold a market in a place therein described, and within certain specified limits there, for the buying and selling of all kinds of vegetables, fruits, flowers, roots, and herbs. The grantee of the market had, for his own profit, permitted part of the space within the limits described to be used for other purposes than those specified in the grant. The remaining part of the space within which

* Where the trial of the prisoner charged with manslaughter was put off, on account of the dangerous state of the party, and who died in the interim, and a bill for murder was found at the following assizes, the trial was allowed to be again postponed, at the instance of the prisoner, on account of the absence of a material witness, but the prisoner held not entitled to be discharged upon a habeas corpus. (*Reg.* v. *Bowen*, 1840, N. P., 9 C. & P. 509).

† A prisoner who is tried for manslaughter on the coroner's inquisition may be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85. (*Reg.* v. *Pool*, 1841, N. P., 9 C. & P. 728). Where the prisoner had been acquitted on a charge of aiding and abetting murder:—Held to be no bar to an indictment charging him as an accessary before the fact. (*Rex* v. *Birchenough*, 1836, 1 Moo. C. C. 477).

‡ In ejectment, the only case in which a map of property is receivable in evidence is where it is undisputed that, at the time the map was made, the property belonged to the person from whom both parties claim. (*Doe* d. *Hughes* v. *Lakin*, 1836, N. P., 7 C. & P. 481).

the market was to be held by the terms of the grant became insufficient for the public accommodation, and there was not, on ordinary occasions, space within the market for carts and waggons resorting thither with vegetables, &c.

The Court held, it was the duty of the lord, having franchise of the market, to take care that there is sufficient room for all the purposes of the market, as far as its limits will allow; therefore, that he could not maintain an action against a person selling out of the limits, unless he shewed that he first apprized the party that there was, at the time of such sale, room in the market, to which he might resort.

REX *v.* STARKEY, E. T. 1837. K. B. 2 *N. & P.* 165; S. C. 7 *Ad. & E.* 95.

THE lord removed the market and demised the site of the new one to lessees, and by the terms of the lease a power was given of imposing tolls on all persons for selling or exposing goods to sale, there being no evidence that stallage had ever been paid at the old market.

A market cannot be removed unless on the soil of the lord of the manor.

The Court held that the removal was bad, as imposing restrictions on the liberty of erecting stalls; to render it valid, the site to which the market is removed ought to be on the soil of the land, and it is essential that he should have the controul over it.

MAYOR OF MACCLESFIELD *v.* PENLEY, M. T. 1832. K. B. 1 *N. & M.* 708; S. C. 4 *B. & Ad.* 397.

IN this case—

The Court held, that a custom to exclude all persons from selling commodities on the market-day, except in the market, is valid in law; and proof, that, until within a recent period, no private shop existed in the town where the defendant's commodities were sold, held sufficient to prove such a custom.

A custom that certain commodities shall be sold only in the market on market-day,

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MOSLEY *v.* WALKER, T. T. 1827. K. B. 7 *B. & C.* 40.

IN an action on the case, the right claimed by the lord to exclude all persons from selling in their own houses commodities (fish), which were usually sold in the market, was found by the jury to be known and recognised.

or to exclude shopkeepers from selling fish usually sold in a market, is good.

The Court held, 1st, that as such exclusive right might by law exist wherever there is an ancient right to a market, either by grant or prescription, the question was properly left to the jury; and 2ndly, that it was properly left to them to decide as to the sufficiency or conveniency of the market-place provided by the lord.

BRIDGLAND *v.* SHAFTER, T. T. 1839. Ex. 5 *M. & W.* 375.

A LESSEE under a parol demise of a market recently created by an act enabling the owner to demise or lease the market or site

A lessee of a market may

maintain an action for disturbance*.

thereof, and all erections, and the lessee to take and enjoy the rents and tolls, &c.—

The Court held, 1st, that he was entitled to maintain an action for the disturbance thereof; and 2ndly, that bringing sheep to an inn within forty yards of the market, and taking purchasers from the market to the place where the sheep were, and selling them, was such a fraud in law as amounted to a disturbance of the right of the owner of the market.

BARON DE RUTZEN *v.* FARR, M. T. 1835. K. B. *5 N. & M.* 617.

A party's styling himself as steward's clerk is not sufficient to shew he was so.

IN case for disturbance of the plaintiff's market—

The Court held, that accounts, signed by a party styling himself the steward's clerk, without any evidence to shew that he was such, dehors the papers themselves, and not purporting to charge the party whose signature they bore, were inadmissible; and the Court, not being satisfied that such evidence might not have weighed with the jury, granted a new trial.

Marriage†.

See 6 Geo. 4, c. 92.

I. RELATIVE TO THE CONSTRUCTION OF STATUTES, p. 635.

II. RELATIVE TO THE MODE BY WHICH THE CONTRACT MAY BE CREATED.

(*a*) BY BANNS, p. 635.

(*b*) BY LICENSE, p. 635.

III. RELATIVE TO THE PLACE OF SOLEMNIZATION, p. 636.

IV. RELATIVE TO THE REGISTRATION OF, p. 636.

V. RELATIVE TO THE EVIDENCE OF, p. 636.

VI. RELATIVE TO MARRIAGE SETTLEMENTS, p. 636.

* The owner of a market may maintain assumpsit for stallage, although there be no proof of any contract. (*Mayor of Newport* v. *Saunders*, 3 B. & Ad. 411; questioning the dictum in the *Mayor of Northampton* v. *Ward*, 2 Stra. 1239; 1 Wils. 115).

† By 5 & 6 Will. 4, c. 54, all marriages before the passing of the act, between persons being within the prohibited degrees of affinity, are not to be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit depending at the time of the passing of the act. By sect. 2, all such marriages hereafter celebrated between persons within the prohibited degrees of consanguinity and affinity are to be absolutely void.

VII. RELATIVE TO THE ACTION FOR BREACH OF PROMISE OF MARRIAGE.

(*a*) Pleas, p. 638.

(*b*) Evidence, p. 638.

VIII. RELATIVE TO INDICTMENTS, p. 639.

I. RELATIVE TO THE CONSTRUCTION OF STATUTES*.

II. RELATIVE TO THE MODE BY WHICH THE CONTRACT MAY BE CREATED.

(*a*) By banns.

Rex *v.* Wroxton, M. T. 1832. K. B. 3 *N. & M.* 712; S. C. 4 *B. & Ad.* 640.

A misnomer from ignorance does not avoid the marriage.

A marriage took place whilst the 4 Geo. 4, c. 76, was in force, after banns published in wrong name of the wife, but of which she was ignorant until after the ceremony performed.

The Court held, that such marriage was valid. In order to invalidate a marriage under the 22nd section, it must be contracted by both parties, with a knowledge that no due publication had taken place.

(*b*) By license.

Poole *v.* Poole, M. T. 1831. Ex. 2 *C. & J.* 66; S. C. 2 *Tyrw.* 76.

If infants marry by license there must be a consent or a living together under the 3 Geo. 4.

After a marriage in 1816 by license between two minors, without consent, they lived together only a few months, when they separated, and continued so until the death of the husband, who always insisted on the nullity of the marriage, and on that ground refused to live with her.

The Court held, that it was not to be deemed a living together as man and wife until the death of the husband, within the meaning of the 3 Geo. 4, c. 75, s. 2.

Rex *v.* Inhabitants of Birmingham, E. T. 1828. K. B. 8 *B. & C.* 29; S. C. 2 *M. & Ry.* 230.

The consent to be given by parents under 4 Geo. 4 is only directory.

A marriage was solemnized by license between a man and woman, the former being a minor, whose father was living, and who did not consent to the marriage—

The Court held, that the 4 Geo. 4, c. 75, s. 16, requiring the consent of the parents of a minor, is directory only, the sects. 2 and 3

* The retrospective clause in 3 Geo. 4, c. 75, (Marriage Act), is not repealed by stat. 4 Geo. 4, c. 76. (*Rose* v. *Blakemore*, E. T. 1826, N. P., 1 R. & M. 382).

inflicting a penalty on the parties disobeying the directions of sect. 16; a marriage, therefore, by a minor by license, without the consent of the father then living, was valid.

III. RELATIVE TO THE PLACE OF SOLEMNIZATION*.

IV. RELATIVE TO THE REGISTRATION OF. See 6 & 7 Will. 4, c. 86.

V. RELATIVE TO THE EVIDENCE OF.

EVANS *v.* MORGAN, E. T. 1832. Ex. 2 *C. & J.* 453.

A statement by a witness that the female was once single, and has since gone by her husband's name, is evidence.

A WITNESS stated that she knew the alleged wife when single, and that she had heard she had since married the party by whose name she had since gone; and the witness was not cross-examined.

The Court held this sufficient evidence of reputation of marriage.

REX *v.* HARBORNE, H. T. 1835. K. B. 4 *N. & M.* 341; S. C. 2 *Ad. & E.* 540.

So, a letter from the first wife, dated Van Dieman's Land, is evidence†.

A PAUPER contracted a second marriage on 11th April, 1831, and it was proved by the father of the former wife, that he had received a letter, in her handwriting, dated Van Dieman's Land, 17th May, 1831. Upon the question of the validity of the second marriage—

The Court held, that such letter was admissible, and that the justices or a jury were justified in coming to a conclusion that she was alive at the time of the second marriage.

VI. RELATIVE TO MARRIAGE SETTLEMENTS‡.

LETHBRIDGE *v.* MYTTON, M. T. 1831. K. B. 2 *B. & Ad.* 773.

Where, under a marriage settle-

BY a marriage settlement certain lands were conveyed, subject to prior incumbrances, which the settlor covenanted to pay off

* Marriages solemnized in chapels, &c., whilst the parish church is under repair, and in chapels wherein banns cannot be legally published, or of which the due consecration may be doubtful, declared valid. (6 Geo. 4, c. 18).

† The registry of marriage being made evidence by statute, and it being the duty of the clergyman to enter it correctly, and the time a fact within his own knowledge:—Held to be proof of the time of marriage. (*Doe* d. *Wollaston* v. *Barnes*, 1834, N. P., 1 M. & Rob. 836). Reputation held sufficient evidence of marriage, though the parties were still alive, and the party adducing it seeking to recover as heir-at-law. (*Doe* d. *Fleming* v. *Fleming*, M. T. 1827, C. P., 4 Bing. 266).

‡ Where a party, after a post-nuptial settlement, mortgaged the same premises—Held, that, as his declarations could only bind him whilst the interest remained in him, his declarations as to the consideration paid by the subsequent purchaser were inadmissible against the claimants under the settlement, which would be to enable him to cut down his own previous acts. (*Doe* v. *Webber*, T. T. 1834, K. B., 3 N. & M. 586).

within twelve months after the marriage, which was not done; but the interest on the mortgages was paid regularly, and no special damage was stated. On a writ of inquiry, the jury assessed nominal damages.

The Court set it aside, and held the plaintiff was entitled to recover the whole amount of the incumbrances, otherwise the trustees could not according to the covenant have the lands unincumbered at the end of the year after the marriage.

ment, the husband covenants to pay off prior incumbrances, and the jury gave nominal damages, the Court will set the finding aside.

WHEELER *v.* DUKE, M. T. 1832. Ex. 1 *C. & M.* 210; S. C. 3 *Tyrw.* 61.

LIMITATION of lands conveyed in a marriage settlement to trustees, to the use of the settlor for life, and an annuity to the wife, if survivor, and subject thereto to the use of all and every the child and children of a former wife, naming them (being five), and their issue lawfully begotten and to be begotten, in equal shares, as tenants in common, "and his, her, or their respective issues"—

The Court held, that the five children took estates for life, and that no estate was taken by grandchildren born after the settlement, and before or after the death of the settlor.

Under a settlement to the children as tenants in common, they take an estate for life.

TREVELYAN *v.* TREVELYAN, T. T. 1826. C. P. 3 *Bing.* 617.

LIMITATION in a marriage settlement between R. T. and E. G. upon uses; first to W. T. and his heirs until the marriage of W. T., and from and after to the use of W. T. and his assigns for the natural life of R. T.; and after his decease, in case the wife should survive, upon certain other trusts to secure her by a term of 300 years an annual sum or yearly charge of £——, and from and after the expiration or sooner determination of the term, and subject thereto in the meantime, to the use of W. T. and his heirs and assigns for ever; and it was provided that, upon the trusts of the term being performed, it should cease. The marriage took effect, but after the date of the indenture, and before the solemnization of the intended marriage, W. T. died.

The Court held, first, that the executors of W. T. took no interest in the lands comprised therein; and, secondly, that R. T. (being the heir-at-law of W. T.) took an estate in fee therein, under the limitations of the settlement, and as the heir of W. T., subject to the terms and powers for the securing the annuity of the wife.

Limitation, first to A. B. and then to C. D. and E. F., his wife; before the marriage A. B. died:—Held, that his executors took no interest*.

* A limitation in a marriage settlement, after limitations to the husband and wife, and issue by that or any other future wife in tail male, to the use of the brothers of the settlor and their issue in tail male:—Held void, as against a subsequent purchaser for a valuable consideration. (*Johnson* v. *Legard*, K.B., 6 M. & Selw. 60). But a limitation to the issue of a second marriage by the settlor is good. (*Clayton* v. *Earl Wilton*, E. T. 1817, K. B., 6 M. & Selw. 67, n.). Where a deed purported to be made in consideration of esteem for A. T., and for divers other good considerations, evidence is inadmissible that it was made in consideration of an intended marriage with A. T.; and it is admissible evidence of this fact that the settlor (the future husband) instructed his solicitor to prepare the deed as a marriage settlement; and that, after the deed was executed and before the marriage, he spoke of it as such. (*Tull* v. *Parlett*, M. T. 1829, N. P., 1 M. & M. 472).

VII. RELATIVE TO THE ACTION FOR BREACH OF PROMISE OF MARRIAGE.

(*a*) Pleas.

KING *v.* GILLETT, T. T. 1840. Ex. *7 M. & W.* 55.

The defendant may plead that plaintiff discharged him from his promise;

IN an action for breach of promise of marriage, plea, that after the promise the plaintiff wholly discharged the defendant from his promise and the performance thereof. On demurrer—

The Court held the plea to be a good plea in form; but, if issue were taken thereon, it would fail, unless the defendant shewed a mutual proposal on the part of the plaintiff to rescind the contract, acceded to by himself,—but leave given to amend.

YOUNG *v.* MURPHY, H. T. 1837. C. P. 3 *Bing. N. S.* 54; S. C. 3 *Scott*, 379.

or that plaintiff had intercourse with A. B. and others unknown.

IN an action against the defendant for breach of promise of marriage, the defendant pleaded, first, that after the making of the promise he was informed and believed that the plaintiff was an immodest, lewd, and unchaste woman; that she had committed acts of fornication with one H. P., and that she was pregnant by the abovenamed person, and had been delivered of a bastard child; secondly, that after the promise she had committed fornication with some person or persons to the defendant unknown, and was pregnant and delivered of a bastard, wherefore he refused &c., as he lawfully might. Upon special demurrer—

The Court held, that such pleas were not bad, on the ground of putting many matters in issue and of uncertainty.

(*b*) Evidence*.

GRIFFITH *v.* WILLIAMS, E. T. 1830. Ex. 1 *C. & J.* 47.

In an action for breach of

IN an action on a breach of promise of marriage, after the handwriting of the defendant had been proved to certain letters, another

* Where the promise proved was, that he would marry plaintiff in July:—Held, that the jury were warranted in inferring a promise to marry generally, and that plaintiff might recover on that count. (*Phillips* v. *Crutchley*, E. T. 1828, C. P., 1 M. & P. 239). To support an action for a breach of promise of marriage, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff and a refusal by the defendant; but, if the plaintiff's father go to the defendant, and ask him if he means to fulfil his engagements to his daughter, and he reply, "certainly not," proof of this will be sufficient. (*Gough* v. *Farr*, 1827, N. P., 2 C. & P. 631). In an action by a lady for a breach of promise of marriage, it is not necessary for the purposes of making out the mutual promises which are necessary to support the action, that the plaintiff by words consented to accept the defendant; but the jury may infer such consent from the circumstance of her making no objection at the time of the offer, and her afterwards receiving visits from the defendant in the capacity of a suitor. (*Daniel* v. *Bowles*, M. T. 1826, N. P., 2 C. & P. 553). But, a mere expression to a third party of intention to marry the plaintiff is not sufficient to support the action for breach of promise; and where coupled with a statement, "as soon as my business is settled"—Held, only conditional, and that performance must be averred. (*Cole* v. *Cottingham*, T. T. 1837, N. P., 8 C. & P. 75). To an action for breach of promise of marriage, the defendant did not plead the

was offered, which was also proved to be so, but was contradicted by the defendant's witnesses, and the Judge submitted it with others to the jury to compare.

The Court held that it was competent for the jury so to do.

promise of marriage, comparison of handwriting allowed.

VIII. RELATIVE TO INDICTMENTS*.

Marshal of the King's Bench. See *Escape—Prison—Prisoner.*

Master, Reference to.

REX *v.* MORLEY, T. T. 1835. K. B. 4 *Ad. & E.* 849.

THE defendant had been examined before the Master, who had reported that the defendant had cleared himself of the contempt—

The Court refused to discuss the correctness of the report, unless it appeared from the interrogatories and answers that he had been mistaken; and, semble, it is not a sufficient ground for reviewing it that it is against the opinion of the Judge who granted the attachment.

In general, the Court will not discuss the correctness of the Master's report†;

CORRY *v.* WHARTON, H. T. 1836. C. P. 1 *Scott*, 664.

ON a reference to the Prothonotary—

The Court will take into their consideration the propriety of reasons which induced the officer to come to his conclusion, and which appear upon the face of the proceedings.

though, where reasons are stated, they may be disputed.

general issue, but only that the plaintiff after the promise conducted herself in a lewd, unchaste, and immodest manner, &c.:—Held, that on this state of the pleadings the plaintiff had the right to begin. (*Harrison* v. *Gould*, 1836, N. P., 7 C. & P. 580).

* Indictment against the wife of W. S. and others for a conspiracy in procuring W. S. to marry:—Held, that W. S. was not a competent witness in support of the prosecution:—Held, that in all cases where husband and wife are admissible witnesses against each other, they are also admissible for each other. (*Rex* v. *Serjeant*, H. T. 1826, N. P., 1 Ry. & M. 352). The marriage of an infant by license, without the consent of parent or guardian, solemnized in the interval between July 22, 1822, (when 3 Geo. 4, c. 75, received the royal assent, by which sect. 11 of 26 Geo. 2, c. 33 is repealed), and September 1, 1822, when 3 Geo. 4, c. 75, began to operate generally, is valid. (*Rex* v. *Waully*, 1827, 1 Moo. C. C. 163).

† Upon a reference by the Court to the Master, who had refused to allow further affidavits to be filed after a fixed day, the Court refused to interfere with the discretion exercised by him. (*Hall* v. *Anderton*, H. T. 1840, B. C., 8 D. P. C. 326). On an application for a rule to compute principal and interest on a bill of exchange, without the production of the instrument before the Master, the Court refused to give an opinion as to whether the production of the bill was necessary, but granted the rule, leaving the matter for the decision of the Master. *Sanderson* v. *Lee*, M. T. 1838, C. P., 7 D. P. C. 97).

Master and Servant.

See 6 Geo. 4, c. 63.

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II. RELATIVE TO THE CREATION OF THE SITUATION OF MASTER AND SERVANT, AND OF CONSTRUCTION OF CONTRACTS, p. 641.

III. CONSEQUENCES OF RELATIVE SITUATION OF MASTER AND SERVANT BEING CREATED.

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(*d*) RIGHTS OF SERVANT AGAINST HIS MASTER.

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(*e*) LIABILITY OF SERVANT, p. 649.

IV. TERMINATION OF RELATIVE SITUATION OF MASTER AND SERVANT.

(*a*) BY SENDING SERVANT TO PRISON, p. 649.

(*b*) OF THE NOTICE, p. 650.

(*c*) OF THE GROUND OF DISMISSAL, AND PLEAS AND EVIDENCE CONNECTED WITH, p. 651.

V. JURISDICTION OF JUSTICES OVER SERVANTS, p. 652.

I. RELATIVE TO WHO IS DEEMED A SERVANT. See also, ante, tit. *Driving.*

QUARMAN *v.* BURNETT, E. T. 1840. Ex. 6 *M. & W.* 499.

The hirer of job horses attached to his own carriage is not the master of the coachman, so as to render him liable.

THE defendants, having a carriage of their own, were in the habit of hiring horses, for the drive or the day, of the same jobmistress, and giving a gratuity to a driver of the latter, for whom they also provided a coat and hat, which were used on each occasion of his accompanying them; and the injury happened during his leaving the horses unattended whilst he went to deposit the hat.

The Court held, that he was not to be deemed the servant of the defendants, so as to render them liable for the injury arising from such negligence.

II. RELATIVE TO THE CREATION OF THE SITUATION OF MASTER AND SERVANT, AND CONSTRUCTION OF CONTRACTS.

PHILLIPS *v.* JONES, T. T. 1830. K. B. 1 *Ad. & E.* 333.

If A. goes to B. on trial as an apprentice, and serves two years, the relation of master and servant is created*.

UPON a contract for an intended apprenticeship of the plaintiff, the latter entered into the defendant's service upon trial, and continued to work for nearly two years, and after several applications by the plaintiff's father, and evasions by the master, to execute the indentures, the latter, upon a quarrel, dismissed the plaintiff from his employment.

The Court held, that the Judge properly directed the jury, if they thought the defendant's conduct such as to justify the plaintiff's father in considering the contract for an apprenticeship as rescinded, the plaintiff was entitled to compensation for her services.

RIDGWAY *v.* HUNGERFORD MARKET COMPANY, E. T. 1835. K. B. 4 *N. & M.* 797; S. C. 3 *Ad. & E.* 171.

Quarterly payments of an annual salary raise a presumption of an agreement to that effect.

THIS was an action of debt to recover a clerk's salary; and the declaration contained a special count, stating that the plaintiff was nominated and appointed clerk, at a salary of 200*l.* payable quarterly.

Per Cur.—Evidence of successive quarterly payments is sufficient to establish an allegation, that the salary of a clerk is payable quarterly, although an appointment is entered in a book at an annual salary only, and no mention made of the periods when it is to be paid.

FAWCETT *v.* CASH, H. T. 1834. K. B. 3 *N. & M.* 177; S. C. 5 *B. & Ad.* 904.

If salary is to increase yearly,

THIS was an action to recover damages for an alleged breach of contract by the defendant to retain the plaintiff in his service for a

* A contract, by which a servant hires himself to a master as a footman and groom, is not dissolved by a subsequent contract, by which he engages to bind himself to serve in a different character at higher wages, and in a foreign country, although the servant accompanies his master into such foreign country, the service performed abroad being the same as that originally contracted for. (*Rex v. Inhabitants of Buckingham*, H. T. 1834, K. B., 3 N. & M. 72).

it amounts to a yearly hiring;

year. In the first count of the declaration, upon which the question arose, it was stated as an absolute promise to retain him for a year; and the following was the contract proved:—"Mr. Cash engages to pay Thomas Fawcett 12*l.* 10*s.* per month for the first year, and advance 10*l.* per annum until the salary is 180*l.*" Upon this, at the trial before *Denman*, C. J., a verdict was found for the plaintiff, with leave for the defendant to move to set that verdict aside, and enter a nonsuit.

Per Cur.—This agreement must be taken to be a contract for a year unless the contrary be proved. In the case of servants, the custom is so well established of each party being at liberty to dissolve the contract upon a month's notice, that that may be taken to be an exception to the general rule. The same may be said of furnished lodgings.

WILLIAM *v.* BYRNE, H. T. 1837. K. B. 2 *N. & P.* 139; S. C. 7 *Ad. & E.* 177.

and can only be terminated at the end of the current year.

A CONTRACT to serve as reporter to a newspaper, one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties shall respectively please—

The Court held it to be a yearly service so long as it lasts, and cannot be terminated except at the end of any current year.

III. CONSEQUENCES OF RELATIVE SITUATION OF MASTER AND SERVANT CREATED.

(*a*) RIGHTS OF MASTER AGAINST HIS SERVANT.

See also, ante, tit. *Embezzlement.*

REX *v.* ELLIS, M. T. 1826. K. B. 6 *B. & C.* 145.

On an indictment against a servant for stealing, it is discretionary with the Judge to allow evidence of several acts of felony.

UPON an indictment for feloniously stealing 6*s.* by a servant, the evidence shewed several acts of felony, and it was objected that the prosecutor ought to have been confined to the proof of a single act of felony.

The Court held, it was discretionary with the Judge to allow the single act of felony only to be proved, or several acts of felony.

(*b*) RIGHTS OF MASTER AGAINST THIRD PERSONS.

HODSOLL *v.* STALLEBRASS, E. T. 1840. Q. B. 8 *D. P. C.* 482; S. C. 3 *P. & D.* 200; S. C. 9 *C. & P.* 63.

Where an injury is done to an apprentice, the master is entitled to damages for prospective loss.

IN case by the master, for personal injury to an apprentice, whereby the master had lost the profit which would have accrued to him from his said apprentice—

The Court held, that the jury are entitled to take into consideration, in their estimate of damages, not only the loss incurred by the master up to the commencement of the action, but the whole prospective damage which may result to him from the injury.

SYKES *v.* DIXON, E. T. 1838. Q. B. 1 *P. & D.* 463; S. C. 9 *Ad. & E.* 693.

In an action for harbouring a servant, the defendant may shew the contract was void.

B., BY a memorandum of agreement, signed by himself only, agreed to work for the plaintiff, "manufacturer of powder flasks, and for no other person whatsoever, from the 17th of August, 1833, during and until the expiration of twelve months, and so on from twelve months' end to twelve months, and until I shall give J. S. (plaintiff) twelve months' notice in writing to quit."

The Court held, that, as this agreement contained nothing binding on the plaintiff, it was nudum pactum; and therefore, although B. served under the agreement till April, 1836, when he left the service, and worked for the defendant, who was shewn the agreement in question, and warned that B. was the plaintiff's hired servant, that, in an action against defendant for harbouring the plaintiff's servant, it was competent to the defendant to shew that the contract of hiring was altogether void.

(*c*) LIABILITY OF MASTER TO THIRD PERSONS.

M'KENZIE *v.* M'LEOD, T. T. 1834. C. P. 10 *Bing.* 385; S. C. 4 *M. & Scott,* 249.

By the law of Scotland a master is liable for the acts of his servant acting within the scope of his authority*.

THE jury found that a servant was not employed in the scope of her duty, by lighting furze, in cleaning a chimney, usually cleaned by masons, &c., whereby the house and furniture were burned by her, she having been cautioned against doing so—

The Court held, 1st, that, as by the law of Scotland, the master was liable for injury occasioned by the negligence of servants only whilst

* If a servant, driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purposes, the master will not be answerable for any injuries he may do. (*Joel* v. *Morison*, T. T. 1834, N. P., 6 C. & P. 501). So, if a servant, without his master's knowledge, take his master's carriage out of the coach-house, and with it commit an injury, the master is not liable, because he has not in such case intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; but the master in such case will be liable, for he has put it in the servant's power to mismanage the carriage, by trusting him with it. Therefore, where a servant, having set his master down in Stamford-street, was directed by him to put up in Castle-street, Leicester Square, but, instead of so doing, went to deliver a parcel of his own in the Old Street Road, and in returning alone he drove against an old woman and injured her; it was held that the master was responsible for his servant's act. (*Sleath* v. *Wilson*, H. T. 1839, N. P., 9 C. & P. 607). A van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van. B.'s coachman, who was driving B.'s carriage, came up, and there not being room for the carriage to pass, the coachman got off his box, and laid hold of the van's horse's head; this caused the van to move, and thereby a packing-case fell out of the van upon the shafts of the gig, and broke them:—Held, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time this matter occurred. (*Lamb* v. *Palk*, M. T. 1840, N. P., 9 C. & P. 629).

In assumpsit for clothes supplied to the defendant's servant:—Held, that the servant was a competent witness for the plaintiff, on indorsing his name on the record. (*Robinson* v. *Ferreday*, 1839, N. P., 8 C. & P. 752).

acting within the scope of their employment, the Judge properly directed the jury to find a verdict accordingly, as they considered the servant was so acting or not; and, 2ndly, that an agreement to deliver up the furniture at the end of the term did not extend the liability by the Scotch law, independently of any agreement, and which did not apply to the case of a total loss by fire.

(*d*) Rights of servant against his master.

1. *For an Injury done in his Service.*

Priestly *v.* Fowler, M. T. 1837. Ex. 3 *M. & W.* 1.

A servant can maintain no action against his master for an injury, because the latter's cart is overloaded.

In case by a servant against his employer, for injury by the breaking down of a van of the defendant, about which the plaintiff was employed in the carriage of goods, and which was alleged to be overloaded—

The Court held, that, as the plaintiff must have known, probably better than his master, whether the van was likely to proceed safely, and the making of the master responsible would lead to the omission of the caution which the servant is bound to use in the service of his master, the action was not maintainable.

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2. *To recover Wages or Compensation for Service.*

1.—*Action for, when maintainable.*

Smith *v.* Hayward, E. T. 1837. K. B. 2 *N. & P.* 432, *supporting* Archer *v.* Hornor, 3 *C. & P.* 349; *but not* Gandell *v.* Pontigny, 4 *Campb.* 375.

A dismissed servant cannot sue as for wages before the quarter has expired*.

In an action by a servant against his master for wages, the jury found the hiring to be by the year, but wages payable quarterly, and the plaintiff having been dismissed, and, after tender and refusal of his services, having brought an action before the quarter for which he claimed to be paid had expired—

Held, that he could not maintain the action for service done and performed.

Bayley *v.* Rimmell, T. T. 1836. Ex. 1 *M. & W.* 506; S. C. 1 *T. & G.* 806.

A servant who leaves from illness, and is not required to return, may recover on the quantum meruit.

In an action by a servant against his master for wages, there was no proof of any hiring, but only of service, and payment had been made without reference to any definite period or yearly account, and the plaintiff left in the middle of the year from sickness, and was never required to return.

The Court held, that the plaintiff was entitled to recover upon a quantum meruit.

* But where the agreement was for a yearly salary, and the party was dismissed before the end of the year:—Held, that he was entitled to sue for the salary due at the time of dismissal, though the year was not completed. (*Pagani* v. *Gandolfi*, T. T. 1826, N. P., 2 C. & P. 370).

2.—*Declaration.*

HARTLEY *v.* HARMAN, E. T. 1840. Q. B. 11 *Ad. & E.* 798; S. C. 3 *P. & D.* 567.

IN assumpsit on a contract for services, at a salary after the rate &c. per annum, determinable at a month's notice, alleging a dismissal without notice, whereby the plaintiff lost all wages which he might have earned if continued in the service—

The Court held, that he could only recover as damages the wages of one month; and that, for the arrears due, he could only recover in a separate count for work and labour.

Under a count for dismissing without a month's notice, arrears of wages cannot be recovered*.

3.—*Pleas and Defence.*

CLEWORTH *v.* PICKFORD, M. T. 1840. Ex. 7 *M. & W.* 414; S. C. 8 *D. P. C.* 873.

IN assumpsit for services in navigating barges, &c., with a count for goods; plea, that, by agreement with the plaintiff, as master, he was to be liable for losses by pilfering and damage to the goods carried on board; and alleging losses by pilfering, and claiming to set off the damages sustained—

The Court held, that the plea was bad, as amounting to the general issue; and also that the replication de injuriâ was also bad.

To an action for wages, the master cannot plead the servant was liable for losses†,

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HEMINGWAY *v.* HAMILTON, H. T. 1839. Ex. 4 *M. & W.* 115.

IN assumpsit for commission and wages, on a contract for services on a voyage to B., and not to assist in the trading of any other ship, and in default to forfeit such commission, &c.; plea, alleging a fraudulent agreement by the plaintiff with others, to act as agent for them, and to aid and assist in the trading of their ships in the like cargoes; replication, de injuriâ.

or, that the servant agreed to assist others, without averring he did so.

* So, if the contract between the master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year; and he cannot on the common count for wages recover for any further period than that during which he had served. (*Archer* v. *Hornor*, T. T. 1828, N. P., 3 C. & P. 349). The plaintiff, a journeyman carpenter, sued his master on the custom of trade, by which the master, when the journeyman is sent to work in the country, has to pay the coach-fare of the man back to London, and also the back-carriage of his tools. It appeared that this custom did not apply where the man, whilst in the country, was dismissed for misconduct or dismissed himself; the declaration was founded on a supposed general custom, without these exceptions: but the Judge at N. P. allowed the declaration to be amended by inserting these exceptions, and adding averments that the plaintiff was not dismissed for cause, and did not dismiss himself; the plaintiff paying the costs occasioned by this amendment. (*Read* v. *Dunsmore*, M. T. 1840, N. P., 9 C. & P. 588).

† A master advanced money to his female servant, who was under age, for her to purchase a silk dress and other articles, not necessary for her:—Held, that these advances formed no defence to an action for her wages. (*Hedgley* v. *Holt*, M. T. 1829, N. P., 4 C. & P. 104). If a servant has left his service for a considerable time, the presumption is, that all his wages have been paid. (*Sellen* v. *Norman*, T. T. 1829, N. P., 4 C. & P. 80).

The Court held, that the plea was bad, shewing only an intended breach of the agreement, and the acts of assisting others, as alleged, not being such as were specified in the agreement. If the plea had been good, the replication would have been also good, such plea being only matter of excuse for non-performance of the contract.

FISCHER *v.* ARDE, T. T. 1838. Ex. 3 *M. & W.* 486.

If the pleas be not a complete answer to an alleged wrongful dismissal, the plaintiff will be entitled to nominal damages.

IN assumpsit, on an agreement for wages as a courier, for five months certain, at five guineas a month, and, in case of discharge before that period, to pay fifty guineas, and the expenses of return, assigning a double breach—the dismissal before the expiration of the five months, and the refusal to pay the fifty guineas, or any sum for expenses. There was also a count for wages generally. Pleas, 1st, except as to 21*l.*, that plaintiff wrongfully quitted the service; 2ndly, as to the first count, except as to 21*l.*, dismissal for improper conduct; 3rdly, as to the second count, except as to 21*l.*, non assumpsit; and, 4thly, payment into Court on the whole declaration. Replication, joining issue on the 1st and 3rd pleas; to the 2nd, de injuriâ; and to the 4th, damages ultra. At the trial, the jury found for the plaintiff on the 1st and 4th issues, and for the defendant on the others.

The Court held, that, there being no complete answer to the 1st issue, without referring to the plea of payment into Court, which was to be taken to go to the whole declaration, admitting the contract as stated in the 1st count, and that something was due on both the causes of action therein stated, on each of which an undefined portion, not exceeding 21*l.*, was left unanswered, the plaintiff was entitled to nominal damages.

RAVENSCROFT *v.* WISE, T. T. 1834. Ex. 1 *C., M. & R.* 203.

By payment of money into Court in action for wages, the defendants admit they are parties to the contract*.

IN an action by the master for wages and disbursements alleged to have been made on account of the ship, the question being whether the owners were chargeable, or the master must be taken to have paid them out of his own monies—

The Court held, that the matter in dispute being referable to one contract only, by payment of money into Court the defendants admitted that they were parties to that contract, and were precluded from insisting that one was not a party to it.

4.—*Replication.*

MONKMAN *v.* SHEPHERDSON, H. T. 1840. Q. B. 3 *P. & D.* 182.

As a replication to an action for wages is divisible, plaintiff may have judgment for part.

IN debt for wages, plea, alleging a contract to discharge from the service, and forfeit their wages due, for drunkenness, and alleging a forfeiture; replication, a discharge of all forfeitures, and continuance in the employ; and new assignment, that part of the

* In such an action a defendant cannot give in evidence, in mitigation of damages, circumstances which, if pleaded, would have been a bar to the action, more especially where money has been paid into Court. (*Speck* v. *Phillips*, T. T. 1839, Ex., 7 D. P. C. 470).

amount claimed accrued before the forfeiture, and the residue subsequent thereto. On demurrer—

The Court held, that the replication was bad for duplicity, and not stating any consideration for the forfeiture; but that the new assignment was well pleaded, and, the replication being divisible, judgment might be given for the plaintiff as to that.

5.—*Evidence and Inspection of Contract.*

REX *v.* INHABITANTS OF WRANGLE, H. T. 1835. K. B. 4 *N. & M.* 375; S. C. 2 *Ad. & E.* 314.

A WITNESS stated that he and the pauper went together with J. P., who, in their presence, and by their direction, entered the terms of hiring in writing, but which was not signed by himself or the pauper.

Where the terms of hiring are written down, but not signed, parol evidence is admissible*.

The Court held, that, as it did not appear that either of the contracting parties ever saw the writing, or recognised it in any way as their own, that could not be considered as the agreement between the parties; and that parol evidence might be given of the terms of the hiring.

BLOGG *v.* KENT, M. T. 1830. C. P. 6 *Bing.* 614; S. C. 4 *M. & P.* 433.

IN an action on an agreement to take the plaintiff into defendant's employment, the defendant pleaded, 1st, the general issue; 2nd, that there was no memorandum in writing, &c.; to which the plaintiff replied, that there was such a writing.

In an action between master and servant, the defendant is entitled to the inspection of the contract.

The Court held, that the defendant was entitled to inspection of it, as in any other case where there is only one copy of the contract, the party holding is to be considered a trustee, and bound to produce it for the other.

6.—*Sum recoverable.*

BRYANT *v.* FLIGHT, E. T. 1839. Ex. 5 *M. & W.* 114.

IN an action by a servant against his master for wages, it appeared that, by a memorandum contained in a letter, the plaintiff agreed to enter into the defendant's service as manager; and "the amount of payment I am to receive I leave entirely to you to determine."

A servant, who agrees to leave the amount of wages to be determined by his master, is entitled to something†.

The Court held (diss. Baron *Parke*) the letter to imply, that, at all events, something was to be paid; and, on a quantum meruit, it was for the jury to decide the value of the services performed.

* In assumpsit, for wrongfully dismissing a teacher in a school before the expiration of the year for which he was engaged, the defendant pleaded only a special plea, justifying the dismissal, upon which issue was taken:—Held, that on this issue the defendant was entitled to begin. (*Harnett* v. *Johnson*, E. T. 1840, N. P., 9 C. & P. 206).

† But where the plaintiff, a yearly servant, was dismissed in the middle of the year for a cause which was not objected to as improper:—Held, that he could not recover wages for the period he had served, the contract being entire. (*Turner* v. *Robinson*, 1835, N. P., 6 C. & P. 15; S. C. 2 N. & M. 289; S. C. 5 B. & Ad. 789).

FRENCH *v.* BROOKES, E. T. 1830. C. P. 6 *Bing.* 354; S. C. 4 *M. & P.* 11.

And where notice is to be given, the servant can only recover such damages as he would if notice had been given.

BY an agreement with a foreign mining company, the plaintiff was engaged as superintendent for three years, at a salary increasing yearly, with a proviso for a twelvemonth's notice of dismissal, or a twelvemonth's salary, and the reasonable expenses of his return; and if he stayed the three years he should also be entitled to all reasonable expenses of the return to his family. The defendant dismissed him before the expiration of the second year, without notice or paying the year's salary or expenses.

The Court held, that he could only recover such damages as he would have received if notice had been given, and not for the salary which would subsequently have accrued, or the expenses of the return to his family.

7.—Costs.

TIBBITS *v.* YORKE, M. T. 1835. K. B. 5 *N. & M.* 609.

Where a company are subject to double costs after demand of wages:—Held recoverable, though no demand stated in the declaration.

IN an action by a clerk for his salary against the proprietors of the tolls of a river navigation under an act which, by one clause, directed the salary to be paid by the proprietors, and by a separate section subjected them to double costs of suit, if, upon demand made, they should neglect to pay the salary allowed.

The Court held, 1st, that an action could not be supported upon the former clause, but that it might on the two latter jointly, although the declaration alleged no actual demand; and 2ndly, that the plaintiff was entitled to the double costs.

8.—Information for.

WILES *v.* COOPER, T. T. 1835. K. B. 5 *N. & M.* 276; S. C. 3 *Ad. & E.* 524.

Upon an information under 20 Geo. 2, c. 19, for non-payment of wages, the relation of master and servant must appear.

BY 20 Geo. 2, c. 19, it is enacted, that disputes which shall arise between masters and servants in husbandry, who shall be hired for one year or longer, or which shall arise between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers, shall be heard and determined by a justice of the peace; and the justice is empowered to make an order for the payment of the wages, and in case of non-payment for twenty-one days to levy the amount by distress and sale. By 4 Geo. 4, c. 34, s. 5, the justice is empowered to order payment of the amount of the wages which shall appear to be due to any servants in husbandry, artificers, labourers, or other persons named in 20 Geo. 2, c. 19, or in 31 Geo. 2, c. 11, which was passed to empower justices to determine differences between masters and their servants in husbandry, though such servants should have been hired for less time than a year. It was also declared by 4 Geo. 4, c. 34, that the order for the payment of the wages should be final. On an information on these statutes—

The Court held the information bad, because it did not appear that the relation of master and servant, in one of the occupations therein specified, existed between the debtor and the informant.

3. *To Medical Attendance**.

4. *To his Character*†.

5. *To his Livery*‡.

(*e*) Liability of servant§.

IV. TERMINATION OF RELATIVE SITUATION OF MASTER AND SERVANT.

(*a*) By sending servant to prison.

Smith *v.* Kingsford, E. T. 1836. C. P. 3 *Scott*, 279.

Sending a servant to prison on a charge which is abandoned does not dissolve the contract.

The plaintiff went into the service of the defendant as servant on the 19th of November, with wages at the rate of 12*l.* 12*s.* the year. A few days before the termination of the second month, she was sent to prison on a charge of felony made by her mistress, which was afterwards abandoned. She remained in confinement for four days of the third month, when she was liberated, there being no charge substantiated against her. She then demanded three months' wages: wages for two months' were tendered; those for the third were refused, upon the ground that the service had ceased when she was given into custody, before the complete expiration of the second month.

The Court held, that the wages for the third month might be recovered on a general count for work and labour, as the imprisonment

* A master is liable for attendance on one of his servants in illness, brought on in consequence of the service; but not for illness occasioned by the servant's own imprudence, unless the master had been informed of it, and acquiesced. (*Cooper* v. *Phillips*, E. T. 1831, N. P., 4 C. & P. 581).

It seems that a master is not bound to provide a menial servant with medical attendance and medicines during sickness; but if a servant fall ill, and the master call in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there be a special contract between the master and servant that he should do so. (*Sellen* v. *Norman*, T. T. 1829, M. T., 4 C. & P. 80).

† If a servant, when he is taken into a service, brings a written character, and is afterwards dismissed for ill-behaviour:—Semble, that the master does no wrong, if, before he returns the character to the servant, he writes upon it, that the person was afterwards in his service, and dismissed for ill-behaviour. (*Taylor* v. *Rowan*, T. T. 1835, N. P., 7 C. & P. 70).

‡ A servant, being engaged for a year at thirty guineas and a suit of clothes, was provided with a livery suit on his entering the service. He was wrongfully turned away within the year:—Held, that he could not maintain trover for the clothes, that not being the proper form of action. (*Crocker* v. *Molyneux*, M. T. 1828, N. P., 3 C. & P. 470).

§ A servant is liable to an action of trover, though the conversion is for the benefit of his master. (*Cranch* v. *White*, T. T. 1834, C. P., 1 Scott, 314).

of the plaintiff by the defendant on a charge subsequently abandoned did not amount to a dissolution of the contract, and the relation of master and servant still subsisted, though in a slight degree.

(*b*) Of the notice.

Beeston *v.* Collyer, E. T. 1827. C. P. 4 *Bing.* 309; S. C. 2 *C. & P.* 607.

A clerk is entitled to a reasonable notice before discharge, though paid monthly.

In an action for dismissing the plaintiff without notice, it appeared that the plaintiff continued for several years in the service of the defendant as a clerk, and it appeared that, at first, the salary was paid by quarterly payments, though afterwards it was paid monthly.

The Court held, that the jury were properly directed to imply a yearly salary, and that such contract need not be in writing; and that unless reasonable notice were given, or a reasonable ground for dismissal assigned, the contract was to go on to the end of the year, and the master was liable for the full year's salary.

Nowlan *v.* Ablett, E. T. 1835. Ex. 2 *C., M. & R.* 54.

A head gardener is a menial servant as to a month's notice*.

The plaintiff agreed to become the defendant's head gardener, and to manage hot-houses, &c., at the wages of 100*l.* per annum, to live in a house on the grounds, and to have the privilege of taking apprentices.

The Court held, that he was to be deemed only a menial servant, and entitled only to a month's warning.

Williams *v.* Byrne, H. T. 1837. K. B. 2 *N. & P.* 139; S. C. 7 *Ad. & E.* 177.

The usage as to notice is triable by a jury.

Upon a contract to serve as a news-reporter, at certain wages for one whole year, and so from year to year as long as the parties should respectively please—

The Court held the hiring to be a yearly service, and that it could not be terminated but at the end of the current year. The usage in the case of menial servants, to dissolve the contract at a month's notice, is only matter of fact, triable by the jury, and not matter of law; and if put on the record as matter of law, the Court could not distinguish it from any other yearly contract of service.

* The law founded upon usage which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent receiving a salary of 500*l.* a year. (*Beeston* v. *Collyer*, E. T. 1827, N. P., 2 C. & P. 607; S. C. 4 Bing. 309). If a clerk be engaged at a salary of 100*l.* a year, and, having received his wages up to a certain time, serve for some time longer, and then leave the service before the year expires, without due cause and without any notice, whether he is entitled to recover wages up to the time of his quitting, quære? At all events he is liable to a cross action for leaving the service without notice. (*Huttman* v. *Boulnois*, M. T. 1826, N. P., 2 C. & P. 510).

(*c*) Of the ground of dismissal, and pleas and evidence connected with.

Ridgway *v.* Hungerford Market Company, E. T. 1835. K. B. 4 *N. & M.* 797; S. C. 3 *Ad. & E.* 171.

In debt for wages—

A lawful ground of dismissal is available, though not the cause assigned*.

The Court held, that a yearly servant dismissed for sufficient cause cannot recover wages either for the whole of the current year, or pro ratâ in respect of the portion of the year during which the service continued, although the misconduct constituting the sufficient cause of dismissal was not the motive from which the dismissal proceeded.

Amor *v.* Fearon, H. T. 1839. Q. B. 1 *P. & D.* 398.

A clerk claiming to be a partner, a ground of dismissal;

In an action by a servant against his master for dismissing him without notice, it appeared that the plaintiff, a salaried clerk, claimed to be recognised as a partner with his employer, the defendant, who on this ground dismissed him without any notice. Lord *Denman*, C. J., nonsuited the plaintiff. On motion for a new trial—

The Court refused the rule.

Fillieul *v.* Armstrong, T. T. 1837. K. B. 2 *N. & P.* 406.

but, a teacher absenting himself for two days at the end of the vacation, no ground.

In an action by a servant against his master for wages, it appeared that the defendant had retained the plaintiff as French teacher in his school at a yearly salary.

The Court held, that his having absented himself for two days on the expiration of the vacation, was not such a breach of duty arising out of the contract, express or implied, as could justify the defendant in putting an end to it.

Baillie *v.* Kell, T. T. 1838. C. P. 4 *Bing. N. S.* 618; S. C. 6 *Scott*, 379.

If the defendant shews one ground of dismissal that is sufficient, and under the general issue he

In an action on an agreement for not retaining the plaintiff in the defendant's service, with a count on a quantum meruit for services, to the first of which amongst others the defendants pleaded various acts of misconduct on the part of the plaintiff as justifying his dismissal:—Held, that it was sufficient to establish one good ground of discharge, and that the jury were justified in ascribing the dis-

* A master can only dismiss a servant hired by the year at any intermediate period for moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect of duty. (*Carlo* v. *Brouncker*, H. T. 1831, N. P., 4 C. & P. 518). Where the plaintiff appeared to be a traveller hired by the year, and he had been guilty of assaulting with intent, &c. the defendant's maid servant:—Held, that it was a good ground of dismissal, and the defendant was not compellable to pay wages even for the time he had served, at all events not beyond. (*Atkin* v. *Acton*, H. T. 1830, N. P., 4 C. & P. 208). If a master carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, wilful disobedience, or habitual neglect; and when in such a case a journeyman was found in one of the preserves of the gentleman at whose house the work was done, after a caution had been given him to keep the paths, and upon complaint by the gentleman the master dismissed the journeyman, the Judge left it to the jury to say whether the master was not justified in such dismissal. (*Read* v. *Dunsmore*, 1840, N. P., 9 C. & P. 588).

may shew the defendant's service to be useless*.

charge to the general nature of the plaintiff's conduct, and not to the formal reason assigned at the time; as to the second count—

The Court held, that the defendant might, under the general issue, shew the worthlessness of the services, and the jury take his *conduct* in such service into consideration in estimating the *value* of the service.

V. JURISDICTION OF JUSTICES OVER SERVANTS†.

Mayhem and Wounding.

See 1 *Vict. c.* 85; and also post, tit. *Shooting*.

I. RELATIVE TO THE WEAPON OR MEANS BY WHICH THE INJURY IS OCCASIONED, p. 653.

II. RELATIVE TO THE WOUND, p. 653.

III. RELATIVE TO THE MALICE, p. 653.

IV. RELATIVE TO CONSTABLES OR POLICEMEN, p. 653.

V. RELATIVE TO THE OFFENCE BEING COMMITTED BY SEVERAL, p. 654.

VI. RELATIVE TO THE INDICTMENT, p. 654.

VII. RELATIVE TO THE EVIDENCE, p. 655.

VIII. RELATIVE TO THE WITNESSES, p. 655.

IX. RELATIVE TO THE VERDICT, p. 655.

* In an action for wrongfully discharging the plaintiff and his wife from the service of the defendant, the defendant pleaded, that the wife of the plaintiff obstinately refused to work for the defendant, whereupon he discharged them:—Held bad on general demurrer. (*Jacquot* v. *Bourra*, E. T. 1839, Ex., 7 D. P. C. 348).

† The 4 Geo. 4, c. 34, s. 3, only applies to cases where the relation of master and servant exists. Therefore, a contract to print certain pieces of woollen cotton goods is not within it, and consequently a breach of such contract is not punishable under that statute. (*Ex parte Johnson*, T. T. 1839, B. C., 7 D. P. C. 702). Every man has a right to work for the best price he can get, but if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. (*Rex* v. *Batt*, 1834, O. B., 6 C. & P. 329). The 1 Vict. c. 67 amends the 5 Geo. 4, c. 96, but under 6 Geo. 3 justices have no authority to determine disputes between domestic servants and their masters. (*Kitchen* v. *Shaw*, T. T. 1836, K. B., 1 N. & P. 791).

I. RELATIVE TO THE WEAPON OR MEANS BY WHICH THE INJURY IS OCCASIONED*.

II. RELATIVE TO THE WOUND†.

III. RELATIVE TO THE MALICE‡.

IV. RELATIVE TO CONSTABLES OR POLICEMEN§.

* Where the prosecutor, having on a hat with a hard rim, was struck several times on the head by the prisoner with an air gun, and received a contused wound, which was said to have been caused by the rim of the hat:—Held, and confirmed by the Judges, that it was a wounding within the statute. (*Rex* v. *Sheard*, 1837, N. P., 7 C. & P. 846; S. C. 2 Moo. C. C. 13). So, where a blow was given with a hammer on the face, which broke the lower jaw in two places, the skin was broken internally, but not externally, and there was not much blood:—Held a wounding within the statute 7 Will. 4 & 1 Vict. c. 85. (*Reg.* v. *Smith*, 1837, C. C. C., 8 C. & P. 173). But biting off the end of a person's nose is not a wounding within the meaning of the statute 9 Geo. 4, c. 31, s. 12; nor is biting off a joint from a person's finger. The statute is intended only to apply to wounding produced by some instrument, and not by the hands or teeth, &c. (*Rex* v. *Harris*, 1836, C. C. C., 7 C. & P. 446). So, the throwing vitriol over the prosecutor's face, with intent to disfigure:—Held not a wounding within the statute. (*Rex* v. *Murrow*, 1835, 1 Moo. C. C. 456). In fact, to support an indictment under 9 Geo. 4, c. 31, s. 12, for wounding, the wound must be given with some instrument. (*Rex* v. *Stevens*, 1834, 1 Moo. C. C. 409).

† Under 1 Vict. c. 85, it is now no defence on an indictment for maliciously wounding, &c., that the offence, if death had ensued, would not have amounted to murder; and where parties are convicted of assaults upon any indictments for felonies, the Judges have power to sentence to hard labour. (*Reg.* v. *Anon.*, 1837, 2 Moo. C. C. 40). The continuity of the skin must be broken to constitute a wound within the meaning of 9 Geo. 4, c. 31, s. 12; (*Rex* v. *Wood*, 1830, 1 Moo. C. C. 278); and not a mere abrasion of the outward cuticle. (*Reg.* v. *M'Loughlin*, 1838, C. C. C., 8 C. & P. 635). An injury by a hammer flung at a person, whereby the skin is divided, is a wound within 9 Geo. 4, c. 31, s. 12. (*Rex* v. *Withers*, 1831, 1 Moo. C. C. 294). But where a wound was inflicted in attempting to cut the throat, which amounted only to a slight scratch, and wounds inflicted on the hands, although deep, which were occasioned by the prosecutor's attempt to defend himself—Held not to be within the 9 Geo. 4. (*Rex* v. *Beckett*, 1836, N. P., 1 M. & Rob. 526). Where the prisoner, whilst taking away ashes, was detained on being charged with taking away part of a kettle, and in the scuffle wounded the prosecutor:—Held, that, if the jury were satisfied that the prisoner had stolen the article, the prosecutor had a right to detain him, and the wounding would be felony. (*Reg.* v. *Price*, 1838, N. P., 8 C. & P. 282). It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, and death ensues, reduce the crime from murder to manslaughter. (*Rex* v. *Lynch*, 1832, O. B., 5 C. & P. 324).

‡ On an indictment for maliciously cutting, malice against the individual cut is not essential: general malice is sufficient; an intent to do grievous bodily harm is sufficient, though the cut is slight, and not in a vital part; the question is not what the wound is, but what wound was intended. (*Rex* v. *Hunt*, 1825, C. C., 1 Moo. 93). In the case of mayhem, the term "malice" does not mean malice aforethought. (*Reg.* v. *Griffiths*, 1838, N. P., 8 C. & P. 248). In a case of stabbing, where the prisoner has used a deadly weapon, the fact that the prisoner was drunk does not at all alter the nature of the case; but if the prisoner had intemperately used an instrument, not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent in him at the time. (*Rex* v. *Meakin*, 1836, N. P., 7 C. & P. 297).

§ If a police constable, on being sent for at a late hour of the night to clear a beer-house, do so, and one of the persons on leaving the house, and being told to go away, refuse to do so, and use threatening language, the police constable is justified in laying hands on him to remove him; and if he cut the police con-

V. RELATIVE TO THE OFFENCE BEING COMMITTED BY SEVERAL*.

VI. RELATIVE TO THE INDICTMENT†.

stable with a knife with intent to do grievous bodily harm, this is a capital offence; and the fact of the police constable having laid hands on the party would not have reduced the crime to manslaughter if death had ensued. (*Rex* v. *Hems*, 1836, N. P., 7 C. & P. 312). The prisoner was indicted for cutting and maiming, with intent to prevent his apprehension for an offence for which he was liable to be apprehended; to wit, for that he did violently assault and beat A. B. The prisoner was taken before the magistrates by the prosecutor on a warrant directed to him for an assault on A. B., and ordered to find bail, which he refused to do, and whilst the commitment was making out, escaped. The prosecutor, by verbal directions of the magistrates, pursued the prisoner, and, in attempting to apprehend him, was cut by him:—Held well convicted, and that the offence was rightly described. (*Rex* v. *Williams*, 1833, 1 Moo. C. C. 387). If a person be playing music in a public thoroughfare, and thereby collect together a crowd of people, a policeman is justified in desiring him to go on, and in laying his hand upon him, and slightly pushing him, if it be only done to give effect to his remonstrance, and if the person, on so small a provocation, strike the policeman with a dangerous weapon, and kill him, it will be murder; but otherwise, if the policeman give him a blow, and knock him down. (*Reg.* v. *Hogan*, 1837, O. B., 8 C. & P. 167). But if a constable, having a warrant to apprehend A., gave it to his son, who, in attempting to arrest A., was stabbed by him with a knife, which A. happened to have in his hand at the time, the constable then being in sight, but a quarter of a mile off:—Held, that this arrest was illegal, and that if death had ensued, this would have been manslaughter only, unless it was shewn that A. had prepared the knife beforehand to resist the illegal violence. (*Rex* v. *Patience*, 1837, N. P., 7 C. & P. 775). And where a constable, who had verbal directions from the magistrate to apprehend all persons playing at thimble-rig, attempted to apprehend the prisoner and his companions playing at thimble-rig in a public fair. The constable, with assistance, took one of the party, but the prisoner and the rest rescued him, and got off. In the evening of the same day the constable found the prisoner in a public-house, not having been able to find him before, and endeavoured to apprehend him, stating it was for what he had been doing in the fair. The prisoner escaped into a privy, and the constable called the prosecutor to his assistance, and together they broke open the privy door, and endeavoured to take the prisoner, who thereupon stabbed the prosecutor. A conviction for feloniously cutting and maiming was held wrong. (*Rex* v. *Gardener*, 1833, 1 Moo. C. C. 390).

* Two private watchmen, seeing the prisoner and another person with two carts laden with apples, went up to them, intending, as soon as they could get assistance, to secure them; one of the watchmen walked beside the prisoner, and the other watchman beside the other person at some distance from the prisoner. The other person wounded the watchman, who was near him:—Held, that the prisoner could not be convicted of this wounding, unless the jury should be satisfied that the prisoner and the other person had not only gone out with a common purpose of stealing apples, but also had the common purpose of resisting with extreme violence any person who might attempt to apprehend them. (*Rex* v. *Collison*, 1831, N. P., 4 C. & P. 565).

† On an indictment for cutting, &c., under 9 Geo. 4, c. 31, it being questionable whether a particular count in an indictment for felony was not bad on demurrer upon an objection that would be aided by verdict, and this being pointed out to the Judge before plea pleaded, his Lordship, to save the public time, directed the trial to proceed, saying that if the prisoner should be convicted on evidence, which in his opinion was applicable to this count only, he would consider it as demurred to, and allow the demurrer to be argued, putting the prisoner in the same situation as if the count had been demurred to in the first instance. (*Rex* v. *Cordy*, 1828, N. P., 3 C. & P. 425). On an indictment charging the prisoners that they, with a stick and with their feet, did strike, kick, and wound &c., with intent &c.:—Held, that the means by which the wound was inflicted need not be stated, and would be surplusage, and that being stated would not confine the Crown to the means stated; and that, whether the wound was from a blow with a stick or a kick from a shoe, the indict-

VII. RELATIVE TO THE EVIDENCE*.

VIII. RELATIVE TO THE WITNESSES†.

IX. RELATIVE TO THE VERDICT‡.

ment would be equally supported. (*Rex* v. *Briggs*, 1831, 1 Moo. C. C. 318). A count, charging the wounding with intent to resist lawful apprehension by a metropolitan police officer, to wit, for committing damage and injury to certain plants and roots in a garden &c.:—Held good. (*Rex* v. *Fraser*, 1834, 1 Moo. C. C. 419). But, on an indictment for assaulting and wounding with intent to resist apprehension, the warrant to apprehend leaving the Christian name of the prisoner in blank:—Held bad; it should have assigned some reason for the omission, and given some distinguishing particulars of the person to be apprehended. (*Rex* v. *Hood*, 1830, 1 Moo. C. C. 281). So, where the indictment alleged the act to have been done "feloniously, wilfully, and maliciously," and not "unlawfully," the word used in the statute held insufficient. (*Rex* v. *Ryan*, 1837, N. P., 7 C. & P. 854; S. C. 2 Moo. C. C. 15). If a prisoner be indicted for any felony which includes an assault, he may be convicted of the assault, if the indictment contain any one good count, although all the other counts may be bad. (*Reg.* v. *Nicholls*, 1840, N. P., 9 C. & P. 267). Where the indictment contained the usual counts, and one for a common assault, the verdict of guilty allowed to be entered on the count on felony, for the intent to do grievous bodily harm; and held, by the fifteen Judges, on the objection for misjoinder, that the conviction was good. (*Rex* v. *Jones*, 1839, N. P., 8 C. & P. 776). Although, by 7 Will. 4 & 1 Vict. c. 85, ss. 2, 4, the wounding with intent to do murder, and to maim, or to do bodily harm, be subject to different judgments, it is no objection that counts laying the wounding with different intents be joined in the same indictment. (*Rex* v. *Strange*, 1837, C. C. C., 8 C. & P. 172).

* An indictment under 43 Geo. 3, c. 58, for cutting and maiming with intent to murder and disable, is not supported by evidence of a cutting with intent to produce temporary disability in a person lawfully apprehending the prisoner. (*Rex* v. *Boyce*, 1824, 1 Moo. C. C. 29). If a man be drunk, this is no excuse for any crime he may commit; but where provocation by a blow has been given to a person who kills another with a weapon which he happens to have in his hand, the drunkenness of the prisoner may be considered, on the question whether the prisoner was excited by passion or acted from malice; as also it may be on the question, whether expressions used by the prisoner manifested a deliberate purpose, or were merely the idle expressions of a drunken man. (*Rex* v. *Thomas*, 1837, N. P., 7 C. & P. 817). The question, whether, if death ensues, the crime would amount to murder, is a question of law, to be decided by the Judge, and not for the opinion of the jury, aided by the observations of the Judge. (*Rex* v. *Beeson*, 1835, C. C. C., 7 C. & P. 142). In considering whether if death had ensued, the act would amount to murder, the jury are to consider if the instrument employed was, in its ordinary use, likely to occasion death. Where the prisoner beat the prosecutor about the head with a tin can, with such violence and frequency as to satisfy the jury that serious bodily harm was intended, the prisoner was convicted. (*Rex* v. *Howlett*, 1836, N. P., 7 C. & P. 274). The deposition of a witness for the prosecution, who has gone to sea, cannot be read in evidence on the part of the prisoner, without consent on the part of the prosecutor, but with such consent it may be. (*Reg.* v. *Hogan*, 1837, O. B., 8 C. & P. 167).

† On a trial of the prisoner for stabbing, &c., A. C., also stabbed by him at the same time, and for which an indictment is also pending, may be examined as to the wound inflicted on him, for the purpose of identifying the instrument. (*Rex* v. *Fursey*, T. T. 1833, N. P., 6 C. & P. 81).

‡ On an indictment for cutting and maiming with intent to do grievous bodily harm, a prisoner may be convicted whose main and principal intent was to prevent his lawful apprehension, if, in order to effect the latter intent, he also intended to murder, do grievous bodily harm, &c. (*Rex* v. *Gillow*, 1825, 1 Moo. C. C. 85. A. was fighting with his brother, and, to prevent this, B. laid hold of A., and held him down upon a locker on board the barge in which they were, but struck no blow; A. stabbed B.:—Held, that if B. did nothing more than was sufficient to prevent A. from beating his brother, and had died of the stab, the

Member of Parliament. See tits. *Election—Parliament.*

Memorial of Annuity. See tit. *Annuity.*

Merger.

See, also, tit. *Surrender.*

THORN *v.* WOOLCOMBE, M. T. 1831. K. B. *3 B. & Ad.* 586.

A lessee, subject to a mortgage, who sells and assigns his interest, merges the lease and mortgage.

A LEASE was granted for ninety-nine years, determinable on lives, the lessees afterwards demised to P. for the residue of the term, if their interest should so long continue, subject to a rent and covenants, and power of re-entry, before which P. had become possessed of the reversion in fee, subject to a mortgage term granted by him previous toe th demise to him; P. afterwards conveyed the whole of his interest to a purchaser, to whom the mortgagee also assigned the term, but the vendee was to retain part of the purchase-money in his hands, upon trust, to be paid over on the expiration of the lease, and interest in the mean time, P. having the rent, and performing the covenants.

The Court held, that the first demise to P. being an absolute assignment of the lessee's interest, upon the subsequent sale and assignment by him, both the mortgage term and lease became merged; and the lease becoming thereby extinguished, P. became entitled to have the residue of the purchase-money paid over to him.

DOE *d.* RAWLINGS *v.* WALKER, H. T. 1826. K. B. *5 B. & C.* 111.

If a party can hold an estate in two characters it is no merger*.

BY lease dated September, 1788, T. W. demised certain premises to his nephew, J. W., for twenty-one years, (viz. till 29th September, 1809), J. W. entered and was possessed at the time of the making the demise and lease next mentioned; by will dated January 20, 1799, T. W. devised the said premises to his said nephew, J. W., for life. By indenture of lease, dated 13th December, 1799,

offence would have been murder; but that if B. did more than was necessary to prevent the beating of A.'s brother, it would have been manslaughter only. (*Rex v. Bourne*, 1831, O. B., 5 C. & P. 120).

* Where a testator, after the date of his will (never re-published), acquired a fee and a term to attend the inheritance assigned to P., who after the death of the testator became seised in right of his wife of a moiety of the estate, and, having entered into the receipt of the rents and profits of the entirety, afterwards joined his wife in a feoffment and fine sur cognizance, &c., with proclamations:—Held, first, that the term did not merge in the wife's estate, but that the feoffment and fine operated as a disseisin and forfeiture of the term, of which advantage might be taken by entry within five years either after the forfeiture or expiration of the term, but might in the meantime be taken as subsisting for the purpose of enabling the personal representative of P. to recover on a demise by him in ejectment:—Held, also, that an entry to avoid the fine, although not authorized by the party entitled, was sufficiently satisfied by an ejectment founded on it. (*Doe* d. *Blight* v. *Pett*, T. T. 1840, Q. B., 11 Ad. & E. 842; S. C. 4 P. & D. 278).

T. W. devised the said premises to his said nephew J. W. from Michaelmas day, 1809, for sixty years, at the yearly rent of 60*l.*

The Court held, that the interesse termini, created by the lease of December, 1799, was not merged in the life estate devised to the lessee in January, 1799, the life estate being conveyed away by the lessee, J. W., before Michaelmas, 1809, so that he would not have that estate and the leasehold estate by way of present interest at one and the same time; but might, at any one period from T. W., the testator's, death to the time of the alienation, have had both estates in the character of lessee.

Merits, Affidavit of.

JOHNSON *v.* POPPLEWELL, T. T. 1832. Ex. 2 *C. & J.* 545; S. C. 3 *Tyrw.* 715.

An affidavit by a town-agent swearing to belief is sufficient*;

THE affidavit verifying the plea in abatement was sworn before the declaration was delivered.

The Court held, that the plea might be treated as a nullity; but, on the ground of connivance in delivering the declaration after post-hours on Saturday, in order to defeat the plea, set the judgment aside on payment of costs and affidavit of merits. An affidavit of merits by the town-agent from information and belief not contradicted, held sufficient.

WORTHINGTON *v.* ———, T. T. 1835. Ex. 2 *C., M. & R.* 315. S. C. *not* S. P. 4 *D. P. C.* 243.

but it is not enough for a

AN affidavit of merits was made by the defendant and his attorney; the former deposing, that, "he was advised and believed;" the

* An affidavit to set aside a regular judgment made by the London agent to the country attorney, and stating that the deponent believed from the instructions from the country attorney that the defendant had a good defence to the action on the merits:—Held sufficient. (*Schofield* v. *Huggins*, H. T. 1835, Ex., 3 D. P. C. 427). But an affidavit on a motion to set aside a verdict, &c. stating only the belief that he had a good, substantial, and available defence to the action:—Held insufficient. (*Page* v. *South*, E. T. 1839, C. P, 7 D. P. C. 412). And an affidavit of merits that the defendant has a good and sufficient defence on the merits, without words applying it to the particular action, is insufficient. (*Tate* v. *Bodfield*, M. T. 1834, Ex., 3 D. P. C. 218). So, an affidavit in support of a rule for setting aside a judgment signed by the plaintiff for want of a plea, alleging that the defendant had merits and a good cause of defence to the action—Held insufficient: the affidavit must express that the defendant had a good defence to the action. (*Lane* v. *Isaacs*, E. T. 1835, Ex., 3 D. P. C. 652). Semble, that an affidavit of merits made by the defendant's attorney as to his belief from instructions received, is insufficient when the defendant himself might make the affidavit. (*Bower* v. *Austin*, T. T. 1835, Ex., 4 D. P. C. 161). An affidavit of merits, sworn by a clerk of the defendant's attorney, must add that he has the management of the cause in question. (*Doe* v. *Macdonnell*, E. T. 1840, B. C., 8 D. P. C. 501). Where a motion is made by a defendant to set aside proceedings on an affidavit of merits and payment of costs, the plaintiff is not entitled to go into a long statement in his affidavit to shew that the defendant has no merits, and if he does the Court will order the Master not to allow them. (*Heane* v. *Battersby*, M. T. 1834, Ex., 3 D. P. C. 213). But, where a defendant moves to set aside proceedings on the ground of irregularity, as for not giving notice of the execution of a writ of inquiry, it is not necessary to swear to merits. (*Williams* v. *Williams*, H. T. 1834, Ex., 2 C. & M. 473).

defendant and his attorney to swear that "they are advised and believe," &c.

latter that he was instructed and advised and believed that the defendant had a good defence on the merits—

The Court directed that the affidavit should be resworn in the usual form.

Mesne Process. See tit. *Process.*

Mesne Profits, Action for.

I. RELATIVE TO WHEN MAINTAINABLE, p. 658.

II. RELATIVE TO A REFERENCE TO THE MASTER, p. 659.

III. RELATIVE TO THE EVIDENCE, p. 659.

IV. RELATIVE TO THE WITNESSES, p. 659.

V. RELATIVE TO THE SUM RECOVERABLE, p. 660.

VI. RELATIVE TO COSTS, p. 660.

I. RELATIVE TO WHEN MAINTAINABLE.

CHATFIELD *v.* PARKER, T. T. 1828. K. B. 8 *B. & C.* 543.

To maintain an action for mesne profits the plaintiff must appear to be in possession.

IN trespass for mesne profits, defendant pleaded title under an elegit upon a judgment against D., in January, 1823, upon an inquisition finding that D. was seised for life of the lands, and that the sheriff delivered them to the defendant; replication, that D. being seised for life before the judgment, to wit, in March, 1820, by bargain and sale conveyed the same lands to plaintiff, and that he entered and became possessed thereof until &c. Upon demurrer—

The Court held, 1st, that a variance in the Christian name of D., as appeared in the judgment and the deed set out on oyer, was immaterial; the replication alleging that by the deed the said D. demised &c.: 2ndly, that although it appeared from the lease that the premises were charged with an annuity to a third party, and were, for securing such annuity, granted to him for 100 years, yet the demise to the plaintiff being from the day preceding the day of the date of the deed to him, it was to be presumed that the grantee of the annuity had never entered; and that at all events the deed of March, 1820, conveying a prior title to that of the defendant under the judgment, and the demurrer admitting the plaintiff to be in possession as alleged, he was entitled to maintain the action.

DOE *d.* THOMPSON *v.* HODGSON, T. T. 1840. Q. B. 4 *P. & D.* 142.

But mesne profits may be re-

IN an action for mesne profits—

The Court held, that, in ejectment by landlord against tenant, it

is not necessary under sect. 2 of 1 Geo. 4, c. 87, to prove that the tenant or his attorney has been served with due notice of trial, in order to enable the plaintiff to go into evidence of mesne profits.

covered, though no notice of trial given in the ejectment.

II. RELATIVE TO A REFERENCE TO THE MASTER.

DOE *d.* UPTON *v.* WITHERWICK, E. T. 1825. C. P. 3 *Bing.* 11; S. C. 10 *Moore*, 267.

THE landlord, in ejectment against the tenant holding over, under the hab. fac. poss., took, amongst other things, crops severed by the tenant—

The Court will not refer the question of value to the Prothonotary.

The Court refused to refer it to the Prothonotary to ascertain the value of the crops so taken, the defendant being a trespasser, and the landlord entitled to the mesne profits; and the Court would not, on such an application, try the title to the away-going crops.

III. RELATIVE TO THE EVIDENCE.

DOE *v.* WHITCOMBE, E. T. 1832. C. P. 8 *Bing.* 46; S. C. 1 *M. & Scott*, 107.

IN trespass for mesne profits, it appearing that the defendant came into possession under the defendant in a previous ejectment, whilst the ejectment was pending, and had paid him rent.

The judgment in ejectment is evidence*,

The Court held, that the judgment in ejectment was evidence against him.

DOE *v.* HARVEY, E. T. 1832. C. P. 8 *Bing.* 239; S. C. 1 *M. & Scott*, 374.

IN trespass for mesne profits—

as regards parties privy to it.

The Court held, that the judgment in ejectment against a former tenant in possession was not evidence against the party afterwards found in possession, without proving that he came in under the defendant, so as to make him privy to the judgment in ejectment.

IV. RELATIVE TO THE WITNESSES†.

* Where judgment in ejectment has been allowed to go by default, the plaintiff, in an action for mesne profits, is entitled to recover his reasonable costs, as between attorney and client, and not merely as between party and party. (*Doe* v. *Huddart*, T. T. 1835, Ex., 2 C., M. & R. 316; S. C. 4 D. P. C. 437). In an action for mesne profits, the judgment in ejectment is conclusive of the plaintiff's right to the premises, from the day of the demise laid in the declaration in ejectment, but is no proof of the defendant's possession at that time. The consent-rule admits the possession at the time of the service of the declaration in ejectment; but if the plaintiff intends to go for mesne profits antecedent to that time, he must give distinct evidence of the defendant's possession. (*Dodwell* v. *Gibbs*, 1827, N. P., 2 C. & P. 615).

† In an ejectment, a person who has had possession of the property is not a competent witness for the defendant to prove that he (the witness) has held it for more than twenty years, because, if the lessor of the plaintiff recovered, the witnesses would be liable to an action for mesne profits. (*Doe* d. *Lewis* v. *Preece*, 1831, N. P., 4 C. & P. 556).

V. RELATIVE TO THE SUM RECOVERABLE.

SYMONDS *v.* PAGE, E. T. 1830. Ex. 1 *C. & J.* 29.

Costs of the ejectment though not taxed may be recovered*,

IN ejectment, the plaintiff entered up judgment, but no costs were taxed by the Master, and the plaintiff did not apply to the Court to have his costs taxed, but brought an action of trespass for the mesne profits, in which the defendant suffered judgment by default. On the execution of a writ of inquiry upon this judgment, the jury included in their verdict the sum of 50*l.* for the costs of the ejectment.

Per Cur.—We think the judgment of Lord *Kenyon*, in the case of *Doe* v. *Davis*, (1 Esp. 358), is not fairly stated when it is said that the language of that learned Judge shews that the costs cannot be recovered unless they are taxed. What he says is, that if the costs are taxed, they may be recovered in this form of action. That is the fair inference to be drawn from the language of that learned Judge; and his objection is to the recovery of the extra costs. It certainly would be more convenient that in every case the costs should be taxed, because the officer of the Court is a much better judge of what should be allowed than a jury. But the result of the cases is, that the costs of the ejectment may be recovered though they be not taxed.

DOE *v.* HUDDART, T. T. 1835. Ex. 2 *C., M. & R.* 316; S. C. 4 *D. P. C.* 437.

and all the expenses plaintiff has been necessarily put to.

IN an action of ejectment, there had been judgment by default. In trespass for the mesne profits—

The Court held, that the plaintiff was entitled to recover all the expenses he had been necessarily put to in the ejectment, and was not limited to the taxed costs as between party and party.

VI. RELATIVE TO COSTS.

JOLLIFFE *v.* MUNDY, H. T. 1839. Ex. 7 *D. P. C.* 225; S. C. 4 *M. & W.* 502.

Interlocutory costs cannot be set off against costs in the cause.

THE plaintiff, in an action for mesne profits, was nonsuited, with leave to enter a verdict for nominal damages; and, on motion, a new trial was ordered, but the plaintiff, after serving the rule absolute, obtained a rule to discontinue on payment of costs, but did not pay them, and having brought another action in the name of the nominal plaintiff—

The Court held, that he was not liable to pay the costs of the former trial; and that interlocutory costs could not be set off against costs in the cause.

* Where the defendant only took possession on the 2nd of June, there falling due a sum for ground-rent on the 24th, which he paid:—Held, that, being an outgoing during his occupation, he was entitled to deduct it in an action for mesne profits. (*Doe* v. *Hare*, M. T. 1833, Ex., 2 C. & M. 145; S. C. 4 Tyrw. 29; S. C. 2 D. P. C. 245).

Middlesex, Bill of (Abolished). See post, tit. *Process.*

Middlesex Court of Requests. See post, tit. *Requests, Court of.*

Mill.

GARD *v.* CALLARD, E. T. 1817. K. B. 6 *M. & S.* 69.

A declaration, stating a custom "to pay certain toll" for grinding malt at the plaintiff's mill is sufficient.

IN case upon a custom for not grinding malt at the plaintiff's mill, the declaration alleged the custom to be "to pay a certain toll"—

The Court held, that the declaration was sufficient; that long usage and acquiescence in a uniform payment was cogent evidence of reasonableness, and of which the Court might judge when it came judicially before them.

Mines*.

See tit. *Ejectment.*

ROWE *v.* BRENTON, M. T. 1828. K. B. 8 *B. & C.* 737.

A lease renewable from seven years to seven years gives no right to minerals.

IN trover for copper ore, the longest interest ever claimed by certain conventionary tenants was from seven years to seven years, renewable for ever—

The Court held, that it did not give them a right to the minerals; and though a positive usage to take them might be valid in law, it must be proved, otherwise the right would remain in the lord.

JONES *v.* REYNOLDS, E. T. 1836. K. B. 6 *N. & M.* 441; S. C. 4 *Ad. & E.* 805; S. C. 7 *C. & P.* 335.

But the right to dig and search for ore is an hereditament within the 11 Geo. 2, and therefore the subject of an action for use and occupation.

IN an action for use and occupation of certain land, veins of iron stone, limestone, ore, and minerals, with the appurtenants, of the plaintiff; plea, non assumpsit.

Coleridge, J., expressed a doubt, founded upon the decision in *Doe* d. *Hanley* v. *Wood*, (2 B. & Ald. 724), whether the property was of such a nature, that the action for use and occupation was maintainable under 11 Geo. 2, c. 19; and he gave the defendant leave, in case the verdict should be against him, to move to enter a nonsuit. Verdict for the plaintiff. On motion to enter a verdict for the defendant—

* The custom is, that when butty colliers leave off working without giving notice, they are not entitled to be paid for gate-roading, air-heading, or coals undergone; but if they leave after having given notice, they are entitled to be paid for these things by the owner of the mine; and if the mine be not worked, they

Per Cur.—The doubt which occurred to *Coleridge*, J., on the trial arose from the case of *Doe* d. *Hanley* v. *Wood*, where this Court thought ejectment would not lie for the premises then sued for, relying on various reasons for that opinion; one of these was, that the terms of the indenture did not amount to a grant of any thing for which ejectment lies, but merely to a permission to search and dig for ore. But it does not seem to follow that that permission actually demised and actually exercised would not be a hereditament enjoyed by the lessee, a hereditament being, in Lord Coke's well-known words, "whatsoever may be inherited, be it corporeal or incorporeal, real or personal, or mixed;" and the statute gives this form of action for every hereditament enjoyed.

MUSKETT *v.* HILL, M. T. 1839. C. P. 5 *Bing. N. S.* 694; S. C. 7 *Scott*, 855.

The grant of a license to mine may be assigned; and where there is to be a re-entry for not employing six miners, the notice must state that the party intends to determine the holding.

IN case for obstructing the exercise of a license to work mines, it appeared that the grant was of a license to mine and search for, and also to carry away and convert to their own use, the minerals raised; and after the covenant for effectually working, &c., the deed provided, that in case of failure, after notice to work, to keep six able miners constantly employed, that after one month from such notice it should be lawful for the grantors to re-enter, and that the license should be absolutely determined and void.

The Court held, 1st, that such grant passed an interest as was capable of being assigned; 2ndly, that a notice in the terms "that, unless the grantee kept six miners at work, the grantor would re-enter at the expiration of one month," containing no intimation of an election to determine the grant on account of the forfeiture which had been incurred, but only that, if a further breach of the covenant should be committed, the grantor would enter, &c., was not sufficient to avoid the license, and render the re-entry lawful; the notice should also have stated, that the defendant intended to determine the holding; and lastly, that upon such re-entry and exclusion the plaintiff might properly sue in case.

HARRIS *v.* RYDING, T. T. 1839. Ex. 5 *M. & W.* 60.

In working a mine defendant is bound to put proper supports.

UPON a grant of land, houses, and premises, reserving all mines, &c., with liberty of ingress and egress for working the same, making compensation for damage, &c., the defendant worked so near the surface, without leaving proper supports, that the plaintiff's houses, lands, &c., fell in.

The Court held, that a plea, alleging the right to all mines, &c., and that defendant was not bound to leave any support, could not be sustained, the defendant being bound to work in a reasonable mode.

are not bound to wait till the working is recommenced, and to be then paid by the succeeding butty collier. (*Bannister* v. *Bannister*, 1841, N. P., 9 C. & P. 743).

A tenant agreed to work a coal-mine so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it:—Held, that, under these circumstances, the tenant was not bound to work the mine, and that under the words "fairly workable," a tenant was not bound to work at a dead loss. (*Jones* v. *Shears*, 1836, N. P., 7 C. & P. 346).

PARTRIDGE *v.* SCOTT, M. T. 1837. Ex. 3 *M. & W.* 220.

But undermining more than twenty years ago does not render a subsequent occupier liable.

IN case for negligently working mines, without duly propping, &c., so near to the plaintiff's houses, that they thereby became weakened and shook, &c., it appearing that the land under part of the plaintiff's premises had been formerly excavated, but it was unknown to either party—

The Court held, that the plaintiff had not acquired any right to have the land supported after the lapse of twenty years since the owner of the adjoining land knew or had the means of knowing that the land had been so excavated.

TREDWEN *v.* BOURNE, E. T. 1840. Ex. 6 *M. & W.* 461.

A mining concern is such a trading as the members may bind each other.

A SHAREHOLDER, by letter, interfered by requiring a meeting to be called for the purpose of changing a director.

The Court held, that it amounted to an acquiescence in the concern going on, although the full number of shares originally held out had not been subscribed for. A mining concern is a trading concern, and the members of the company, unless a limited authority be shewn, have power to bind each other by obtaining credit for the purpose of working them, when it appears to be necessary or usual in the management of the mines.

VICE *v.* VISCOUNTESS ANSON, M. T. 1827. K. B. 7 *B. & C.* 409; S. C. 1 *M. & R.* 113.

But the party must be shewn to be a shareholder, or the credit personal.

IN an action for the supply of articles to be used in mines, whereof the defendant was a shareholder, it appeared that the defendant had only paid for the shares to a person calling himself treasurer, and received a certificate purporting to be executed "by order of the directors;" that she was proprietor in certain shares, and her name duly registered, &c.; and that she was entitled to the profits of such share; and it also appeared, that, at the times of the supply, the plaintiff had no knowledge or reason to suppose the defendant in any way interested in the mine, nor had he supplied the goods upon her personal credit.

The Court held, that he could not maintain the action against her.

TAYLOR *v.* PARRY, M. T. 1840. C. P. 1 *Scott, N. S.* 576; S. C. 1 *M. & G.* 604.

In an action against a wrongdoer the occupier need not shew his title*.

THE plaintiffs were lessees under certain persons called the lords of Mold, of all mines and minerals under a large tract of waste land called Mold Mountain. In trover for ore wrongfully extracted by the defendants from a spot which the plaintiffs alleged to be part of Mold Mountain—

* In trover for copper ore raised under the plaintiff's land:—Held, that the presumption, that the right to the minerals accompanied the fee-simple of the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. (*Rowe* v. *Grenfel*, 1824, N. P., 1 Ry. & M. 396).

Where the defendant, in working his coal-mine, broke through the barrier, and worked the coal under the land adjoining, belonging to the plaintiff, and raised it for purposes of sale:—Held, in trespass for such working, that the proper estimate of damages was the value of the coal so raised, without the expense of getting it. (*Martin* v. *Porter*, M. T. 1839, Ex., 5 M. & W. 352).

The Court held, that it was not necessary for the plaintiffs to prove the title or seisin of their lessors; but it was sufficient for them, as against the defendants, who were wrong-doers, to shew a possession and enjoyment by themselves under the lease; and that for this purpose acts of ownership exercised by the plaintiffs, by working mines on other parts of the mountain, were evidence of their right under the spot in question being part of the waste.

Misdemeanor*. See tits. *Conspiracy—Gaming—Indictment—Justice of the Peace.*

Misjoinder. See tits. *Declaration—Executor and Administrator—Husband and Wife—Indictment—Parties to Action—Partner.*

Misnomer.

By 3 & 4 Will. 4, a misnomer cannot be pleaded in abatement†;

By 3 & 4 Will. 4, c. 42, s. 11, it is enacted, "That no plea in abatement for a misnomer shall be allowed in any personal action, but that, in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff by inserting the right name upon a Judge's summons, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the Judge shall think fit."

and in some cases the initials only will suffice.

By sect. 12, it is enacted, "That, in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process and declaration, to designate such persons by the name, initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

Reg. Gen., H. T. 2 Will. 4. K. B. C. P. and Ex.

Rule H. T., 2 Will. 4, re-

It is ordered, that, where the defendant is described in the process or affidavit to hold to bail by initials, or by a wrong name, &c.,

* An attempt to commit a misdemeanor is a misdemeanor, whether the offence was created by statute or was an offence at common law. (*Rex* v. *Roderick*, 1837, N. P., 7 C. & P. 795). Judgment in a case of misdemeanor, committed by the defendant in the office of a justice, allowed to be passed in his absence, on affidavit disclosing great age and infirmity. (*Rex* v. *Constable*, M. T. 1826, K. B., 7 D. & R. 663).

† Where a plaintiff has *sued* a defendant by his wrong Christian name, but has declared against him by his right Christian name, the proceeding is regular since the 3 & 4 Will. 4, c. 42, s. 11. (*Hobson* v. *Wadsworth*, T. T. 1840, B. C., 8 D. P. C. 601).

or without a Christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name.

gulates misnomer in process.

ROSSET *v.* HARTLEY, M. T. 1835. K. B. 5 *N. & M.* 415.

A PLAINTIFF arrested the defendant by a wrong name, but it appeared that he had made inquiries at the bankers where the defendant kept an account, who told him they believed the defendant's name to be that in which he was arrested.

The protection under Reg. Gen. 2 Will. 4, applies after due diligence*.

The Court held the inquiry sufficient within the 32nd of the Regulæ Generales, Hil. Term, 2 Will. 4, so as not to entitle the defendant to his discharge.

Misrepresentation. See tits. *Deceit—Libel.*

Modus. See tit. *Tithes.*

Molliter Manus Imposuit. See tits. *Assault and Battery —Trespass.*

Money. See tits. *Coin and Coinage—Tender.*

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* A defendant waives an objection by misnomer by obtaining a Judge's order, wherein he uses the name by which he was arrested. (*Nathan* v. *Cohen*, H. T. 1835, B. C., 3 D. P. C. 370). Where the defendant had on one occasion admitted his name to be William Purvy, and so signed his name to an agreement with others, the Court refused to discharge him on common bail, on the ground of misnomer, and that his real Christian name was William Hamilton. (*Newton* v. *Maxwell*, H. T. 1832, Ex., 2 C. & J. 215; S. C. 2 Tyrw. 278). A plea amounting to a plea in abatement, on the ground of misnomer, stating only circumstances but not any distinct allegation, that the defendant at the time of the issuing the writ was a peer:—Held insufficient; and judgment quod resp. oust. (*Digby* v. *Alexander*, T. T. 1832, C. P., 8 Bing. 416). Plaintiff declared by the name of "William Cary Moody;" and the cause proceeded to issue in that name. It was sworn that the party intended as plaintiff was John Moody, but there appeared to be a William Moody, a son of John, who was connected with the transaction in question. The Court refused a rule to amend the proceedings by inserting the name of John instead of William; observing, that, if he, John Moody, were really the person originally intended as plaintiff the misnomer could not be taken advantage of at the trial. (*Moody* v. *Aslatt*, H. T. 1835, Ex., 1 C., M. & R. 771; S. C. 5 Tyrw. 492). So, in debt on bond, plaintiff declared against defendant as W. F. B., sued as W. B.; plea, non est factum. At the trial it was proved that the bond was executed by the defendant by the name of W. B., by which name he was well known:—Held, 1st, that there was no variance, and that the bond was not void; 2nd, that the objection was not available under the plea of non est factum. (*Williams* v. *Bryant*, T. T. 1839, Ex., 7 D. P. C. 502).

Money had and received, Action for.

I. RELATIVE TO WHEN OR WHEN NOT MAINTAINABLE.

(*a*) In general, p. 667.

(*b*) In particular.

1. *Concerning Accounts,* p. 670.
2. *Concerning Annuities,* p. 670.
3. *Concerning Appropriation,* p. 670.
4. *Concerning Bastards,* p. 671.
5. *Concerning Contracts rescinded,* p. 672.
6. *Concerning Covenants,* p. 672.
7. *Concerning Charities,* p. 672.
8. *Concerning Composition Deeds,* p. 672.
9. *Concerning Legal Proceedings,* p. 673.
10. *Concerning License, Value of,* p. 674.
11. *Concerning Misrepresentation,* p. 674.
12. *Concerning Mistake, Payments under,* p. 674.
13. *Concerning Notice, Payment after,* p. 675.
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15. *Concerning Power of Attorney,* p. 676.
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II. RELATIVE TO BY AND AGAINST WHOM MAINTAINABLE, p. 676.

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VIII. RELATIVE TO THE WITNESSES, p. 679.

IX. RELATIVE TO NEW TRIAL, p. 680.

I. RELATIVE TO WHEN OR WHEN NOT MAINTAINABLE.

(*a*) In general.

Scott *v.* Miller, M. T. 1836. C. P. 3 *Bing. N. S.* 811.

To support the action the defendant must have received the money;

In an action for money had and received, it appeared that a bill on the face of it had been drawn by the defendant, the captain of the plaintiff's ship, or his agent.

The Court held, that, without evidence of the money coming into the defendant's hands, the action for money had and received could not be maintained against him.

Milcham *v.* Eycke, H. T. 1838. Ex. 3 *M. & W.* 407.

and the party must be legally entitled to the money;

Stock, the trust property of the wife, was improperly sold out by the authority of the husband and wife.

The Court held, that it still remained a trust fund, in the hands of the agent receiving it, and that the husband could not maintain an action for money had and received, it never having been his money.

Stevens *v.* Badcock, M. T. 1832. K. B. 3 *B. & Ad.* 354.—S. P. Howell *v.* Batt, M. T. 1833. K. B. 2 *N. & M.* 381; S. C. 5 *B. & Ad.* 504.

and there must be a privity*

Money was paid, in the absence of the attorney, to his clerk, who was authorized to receive it, and who gave a receipt for his master, the latter having left his home in an embarrassed state, and never returned.

The Court held, that no action for money received would lie against the clerk, with whom and the plaintiff there was no privity of contract.

Barron *v.* Husband, E. T. 1833. K. B. 1 *N. & M.* 728; S. C. 4 *B. & Ad.* 611.

between the parties; mere agency is not sufficient;

The defendant, the solicitor to the assignees, received from them a sum to pay the costs of the plaintiff, the petitioning creditor, up to the choice of assignees, and he had promised to pay the plaintiff, upon condition of submitting his bill to taxation, which was refused—

The Court held, that the defendant being the agent of the assignees only, there was no privity of contract between him and the plaintiff, to enable the latter to maintain the action for money had and received.

* But where money was paid to a party acting as agent for an assignee, become insane at the time, and afterwards removed:—Held, that, as a mere stranger, the party receiving it was liable. (*Stead* v. *Thornton*, 3 B. & Ad. 357, n.). Where a clerk to magistrates, at their instance, assented to a proposal that the plaintiff should receive a portion of the fees, and he did part of the duties:—Held, that there was a sufficient consideration to support an action for them, as money had &c. (*Rowland* v. *Hall*, T. T. 1834, C. P., 1 Scott, 539). If a party gives another what may be readily turned into money, and is treated as such by the parties, it may render him liable as for money had and received. (*Spratt* v. *Hobhouse*, T. T. 1826, C. P., 4 Bing. 173; S. C. 12 Moore, 395; abridged, ante, tit. *Bankrupt*).

SIMS *v.* BRITTEN, E. T. 1833. K. B. 1 *N. & M.* 594; S. C. 4 *B. & Ad.* 375.

and there is not such privity between an agent and his principal as to enable the latter to sue the former in an action for money had &c.;

B., ONE of several part owners, was also the ship's husband, and he employed the defendants as his agents for general purposes, and, amongst others, to pay monies on account of the ship, and in respect of which they kept a separate account against him as managing owner; but their charge for commission and use of counting-house was always carried to B.'s general account. The defendants having received freight from the East India Company, by which the ship had been employed, and in order to obtain which it was necessary that the receipt should be signed by B. and one other owner, the money so received was placed to the general account of B., as managing owner.

The Court held, that there was no sufficient privity between the defendants and the other owners to enable them to maintain assumpsit for money had and received.

WILKINSON *v.* GODEFROY, H. T. 1840. Q. B. 3 *P. & D.* 411; S. C. 9 *Ad. & E.* 536.

and if a condition, it must have been performed.

THE defendant's son agreed to communicate to the plaintiff a secret for a dye, and the plaintiff agreed to pay him 25*l.* if a colour should be produced to the satisfaction of B., and the plaintiff handed over to the defendant a cheque for 25*l.*, to be paid to his son in that case; but if the colour was not good, the money was to be returned. On the 2nd of September an experiment was commenced as to the dye, and on the 3rd, before it was concluded, the defendant got the cheque cashed; on the 4th, the experiment was finished, and the dye turned out a failure, and was disapproved of by B. The plaintiff demanded the money of the defendant, but without mentioning the decision of B.

The Court held, 1st, that the plaintiff was properly nonsuited, as he had no cause of action till the decision of B. had been communicated to the defendant; and 2ndly, that as the cheque had been treated throughout as money, the defendant had not committed any breach of his duty by getting it cashed, so as to make him liable for money had and received.

NOY *v.* REYNOLDS, M. T. 1833. K. B. 1 *Ad. & E.* 159.

If a party takes upon himself to pay part of the expense of a conveyance, he will be liable to an action for money had and received;

UPON a purchase under an agreement, that the expenses of the conveyance should be paid in equal portions, the attorney employed agreed to accept a horse and 2*l.* from the defendant, the vendee, and that, if the vendor would not pay his share of the expenses, he would not apply to the defendant for any further remuneration; the conveyance was completed, and, a fine being deemed necessary, it was agreed between the vendor and vendee that, if the former would pay that expense, he should not be called upon to pay any part of the expenses of the fine.

The Court referred it for inquiry, whether the defendant, being discharged from any part of the expenses of the fine, had received any consideration for taking upon himself the other expenses of the conveyance, and to that extent he would be liable as for money had and received to the attorney's use.

SIMS *v.* BOND, M. T. 1833. K. B. 2 *N. & M.* 608; S. C. 5 *B. & Ad.* 389.—S. P. SIMS *v.* BRITTEN, E. T. 1833. K. B. 4 *B. & Ad.* 375; S. C. 1 *N. & M.* 594.

but it will not lie by one partner against a banker, in whose name the account is not kept.

IN an action by surviving joint ship-owners, to recover the balance of a banking account, kept by one part owner, being the ship's husband, in his own name only, for freight received by him—

The Court held, that, there being no privity of contract between the bankers and the other owners, and the deposit not being made by him as agent of the other owners, the action for money received to the plaintiff's use could not be maintained. Sums paid to the credit of a customer with a banker are in truth loans by the customer to the banker.

ROTHSCHILD *v.* HENNINGS, E. T. 1829, *in error*. 4 *M. & Ry.* 411; S. C. 12 *Moore*, 559.

So, money had and received will not lie for a deposit, after asking time to complete;

AN original contributor to a foreign loan contractor, upon scrip receipts, transferred them to the defendant in error, and the contractor, the plaintiff, afterwards, from time to time, extended the period of paying up the instalments to stated periods, on certain terms.

The Court held, that the defendant, omitting to comply with the terms of such indulgence, could not afterwards insist upon the contractor accepting the instalments, with interest, on returning the deposit, so as to maintain assumpsit for money had and received.

ATLEE *v.* BACKHOUSE, H. T. 1838. Ex. 3 *M. & W.* 633.

or where money has been paid over pursuant to act of Parliament.

A SEIZURE of spirits having been made on plaintiffs' premises by an excise officer, and a writ of appraisement issued, the commissioners afterwards, upon the application of the plaintiffs, restored the spirit to them at the appraised value, under an agreement that they (plaintiffs) gave up all claim to the seizure, and held themselves responsible for such proceedings for penalties as the board might think fit to institute. The appraised value was paid by plaintiffs to the defendant, the receiver-general of excise. Penalties were subsequently recovered of plaintiffs. The plaintiffs then gave the defendant notice of action, and re-demanded money.

The Court held, 1st, that the plaintiffs could not recover back the money so paid in an action for money had and received, inasmuch as it was paid on a binding agreement, made upon good consideration, whereby the plaintiffs agreed that it should not be recoverable back; and further, that they were precluded from recovering by the provisions of the 7 & 8 Geo. 4, c. 53, s. 98; and 2ndly, that, at all events, the action could not be maintained against the defendant, inasmuch as the money was received by him only for the purpose of it being paid over, pursuant to act of Parliament, and it was not shewn that it remained in his hands till he had notice to retain it.

(*b*) In particular.

1. *Concerning Accounts.*

Lorymer *v.* Stephens, T. T. 1834. Ex. 1 *C., M. & R.* 62.

Upon an admission that an account is right, money had and received lies.

In an action for money had and received, it appeared that there being disputed accounts, the defendant met the plaintiff at a third person's to settle them, and two accounts were produced; the first, containing sums advanced, which the defendant sealed and signed; the second consisting of other items, which he disputed, and refused to sign.

The Court held, that the plaintiff was entitled, upon the first admission, to recover for money had and received.

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2. *Concerning Annuities.* See also ante, tit. *Annuity.*

Davis *v.* Bryan, E. T. 1827. K. B. 6 *B. & C.* 651.

The consideration money for an annuity void cannot be recovered back after the grantor's death.

In an action for money had and received by the executrix of the grantee of an annuity, void for want of the memorial being duly enrolled—

The Court held, that the Court might construe the words of the act as making the instrument voidable only at the will of the party; which, not having done in his lifetime, and the contract having been fully executed, the action was not maintainable.

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3. *Concerning Appropriation.*

Frushling *v.* Schroder, H. T. 1835. C.P. 2 *Scott*, 135; S. C. 7 *C. & P.* 103.

A defendant who holds money as an appropriation is liable to an action for money had and received;

In an action for money had and received, it appeared that goods were consigned by a foreign house to their own account, with directions to the defendants to remit the proceeds to the plaintiffs and advise them of having done so; and the plaintiffs wrote to know the probable amount, to which the defendants replied, that they had received the goods with such directions, but had not then disposed of them; the consignors afterwards failing, the defendants retained the proceeds in satisfaction of their own balance.

The Court held, that the plaintiffs were entitled to recover the amount as money had and received; but the claim for interest could not be supported.

Bignell *v.* Ellis, M. T. 1829. K. B. 5 *M. & Ry.* 165.

but not at the instance of the party directing the appropriation;

The plaintiff had signed an agreement selling all his property to pay off a distress, the surplus to be held by the defendant until it should be ascertained in what sum the plaintiff was indebted to R.

The Court held, that the plaintiff could not countermand the payment to R., and that, until the account was taken, the defendant was entitled to retain the fund.

WEDLAKE *v.* HURLEY, T. T. 1830. Ex. 1 *C. & J.* 83.

A BLANK bill was remitted to A., with an indorsement, "pay to the order of B. (the defendant) under provision for my note in favour of C." (the defendant B. having received the proceeds, and refused to pay them over to C., in an action for money had and received by C.—

The Court held, that the action was not maintainable without something having been done by the remitter of the bill amounting to a privity or assent.

he must, however, assent*.

LILLY *v.* HAYS, T. T. 1836. K. B. 1 *N. & P.* 26.

IN an action for money had and received, it appeared that a party remitted money to the defendant to be paid to the plaintiff, and which he promised the plaintiff to pay.

The Court held, that there was a sufficient consideration moving from the plaintiff to maintain the action for money had and received.

A promise to pay over a remittance is sufficient†.

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4. *Concerning Bastards.* See also ante, tit. *Bastard.*

CLARK *v.* JOHNSON, H. T. 1826. C. P. 3 *Bing.* 424.—S. P. CHAPPELL *v.* POLES, H. T. 1837. Ex. 2 *M. & W.* 867.

MONEY was deposited with bankers in the names of the parish officers, to meet any charges on account of the mother of a bastard child which might accrue, and the mother was, by consent, to receive the interest; the bankers becoming bankrupt, the overseers proved and received a dividend.

The Court held, that the mother might recover it as money had and received; and the permitting such deposits declared to be inconsistent with the letter and spirit of the laws concerning bastards.

Money deposited on account of a bastard child may be recovered back as money had and received.

* Defendant being indebted to plaintiff in 150*l.*, and being employed by T. to perform works for which he was receiving a per centage, wrote an order to T. to pay plaintiff 150*l.* out of the first monies due to the defendant. Afterwards, being indebted to B. in 997*l.*, he executed a deed, reciting the above facts, assigning to B. such sums as there were or should become due to him, defendant, from T., in trust, first to pay plaintiff, and secondly to pay the 997*l.*; defendant afterwards received 150*l.* from T., and plaintiff sued him for money had and received, and on an account stated:—Held, that the action lay for the 150*l.*, though no proof was given of T.'s assent to the order, and though, at the time of making the deed, there was not 150*l.* due from T. (*Pooley* v. *Goodwin*, M. T. 1835, K. B., 4 Ad. & E. 94).

† Where the debtor of the plaintiff, having goods at the defendant's wharfs, gave an authority to the defendant to sell them, and out of the proceeds to pay the plaintiff the balance of freight due to him, and the defendant accordingly sold the goods and received the proceeds:—Held, that the authority did not require a stamp as an order for payment of money; and that after the sale and receipt of the money, the plaintiff was entitled to sue for money had and received. (*Humphreys* v. *Briant*, M. T. 1829, N. P., 4 C. & P. 157).

5. *Concerning Contracts rescinded.*

BEED *v.* BLANDFORD, E. T. 1828. Ex. 2 *Y. & J.* 278.

To constitute a rescinding of the contract, the parties must be in the same situation as before entered into.

IN an action for money had and received, being the consideration of a pier-chain, on the ground of the contract having been rescinded—

The Court held, that it was necessary that the parties should, by the plaintiffs recovering, be placed in the same situation as they originally were before the contract was entered into. Where, therefore, the purchaser of the moiety of his partner's share of a vessel had entered upon and derived the full profits of the vessel, and also deposited the title-deeds with a third person as a security for money advanced to him, the vendor was properly nonsuited in the action.

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6. *Concerning Covenants.*

ENGLISH *v.* BLUNDELL, M. T. 1837. N. P. 8 *C. & P.* 332.

Money had &c. will not lie where there is a right to sue on a covenant.

UPON an agreement under seal by three persons for the purchase of a foreign mine, a sum was deposited conditionally to be repaid to the purchasers should the property, upon inspection by an agent to be sent out by them, turn out to have been misrepresented.

Lord *Denman*, C. J., held that, the deed giving a right to sue for the money on covenant, one of them could not maintain an action for money had and received.

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7. *Concerning Charities.*

JEFFERYS *v.* GURR, M. T. 1831. K. B. 2 *B. & Ad.* 833.

Money paid for charitable purposes not properly applied may be recovered back.

FOR the purposes of the local act for the better relief and management of the poor of C., the guardians were constituted a corporation; and upon a decree of the Court of Chancery, directing a certain portion of charity funds to be paid to parties declared entitled, the guardians ordered the plaintiff, their treasurer, to pay it over to certain persons, which he did. Afterwards, upon a petition to the Court of Chancery, suggesting that the money had not been properly applied, it ordered the plaintiff to repay it.

The Court held, that he was to be considered as having paid it for the use of the guardians, it being money which they ought to have paid, and that he was entitled to recover it back, and that the action was properly brought against the defendant, the treasurer, for the time being.

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8. *Concerning Composition Deeds.*

SMITH *v.* CUFF, E. T. 1817. K. B. 6 *M. & S.* 160.

Money had &c. lies where ex-

THE defendant, a creditor, upon threats of proceeding to a bankruptcy, obtained from his debtor, before signing a composition-deed,

bills to the full amount of his debt, which he indorsed over to a third person, and who, when due, enforced payment from the debtor by action.

torsively obtained to sign a composition-deed.

The Court held, that it was not to be deemed a case of par delictum, but as of money obtained illegally and extorsively, and might be recovered back as money had and received by the defendant, through the medium of the person to whom by his order it was paid.

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9. *Concerning Legal Proceedings.*

HILLS *v.* STREET, T. T. 1828. C. P. 5 *Bing.* 37; S. C. 2 *M. & P.* 96.

UPON a distress made, the tenant, in consideration of forbearance, promised to pay the broker's charges; time was accordingly given, and the charges paid, but the amount thereof, as well as of the rent demanded, was at the time objected to. In an action for money had and received to recover back the excess—

An excessive charge under legal authority may be recovered back;

Per Cur.—Under the circumstances we think that these payments cannot be considered as voluntary payments. If the plaintiff had not paid the broker what he demanded, it is quite clear that his goods would have been removed and sold. It was the apprehension of this that induced him to make them. The cases where this form of action has been held not to lie have been cases where the party had other and more proper remedies. Here, however, the present was the only remedy this plaintiff could have.

REYNOLDS *v.* WEDD, T. T. 1838. C. P. 6 *D. P. C.* 728; S. C. 4 *Bing. N. S.* 694; S. C. 6 *Scott*, 699.

MONEY paid into court in lieu of bail was, upon default in depositing the further sum as security for costs under 7 & 8 Geo. 4, c. 71, s. 2, ordered by the Court to be paid out to the plaintiffs, and a fiat afterwards issued upon an act of bankruptcy committed by the defendant prior to the payment of the money into court.

but it does not lie to recover back money paid under authority of a competent jurisdiction;

The Court held, that such payment was within the exception of payments made by the authority of a court of competent jurisdiction, and that the assignees could not recover.

THE DUKE DE CADAVAL *v.* COLLINS, E. T. 1836. K. B. 6 *N. & M.* 324; S. C. 4 *Ad. & E.* 858.

PLAINTIFF being a foreigner, ignorant of the English language, was arrested at Falmouth soon after his first arrival there from abroad by defendant for 10,000*l.*; defendant and plaintiff then signed an agreement, by which, in consideration of 500*l.* paid by plaintiff to defendant, plaintiff was discharged and not to be again arrested, and was to put in bail in twelve days; the 500*l.* was to be "as a payment in part of the writ," and both parties were to abide the event of the action: the agreement containing no provision for refunding the money if the action should fail. Plaintiff paid the 500*l.* and was released; no bail was put in, and the writ was afterwards set aside for irregularity; plaintiff then sued defendant for

unless the compulsion be only under colorable legal process.

the 500*l.* as money had and received, and the jury found, that defendant knew that he had no claim upon plaintiff.

The Court held, that the action lay, the payment having been made under compulsion of colorable legal process.

KENDALL *v.* ALKEN, H. T. 1834. C. P. 2 *D. P. C.* 783; S. C. 10 *Bing.* 438; S. C. 4 *M. & Scott,* 319.

If a party avails himself of an order of Court he cannot maintain the action because money was improperly retained*.

THE plaintiff, upon the bankruptcy of her son, who was indebted to the defendant, an attorney, for costs, instructed the defendant to obtain proof against the estate on a bond from her son to her and in the defendant's hands, and in consideration of the defendant's obtaining which the plaintiff agreed to pay the defendant's claim on her son; the plaintiff afterwards obtained an order for taxing both the defendant's bills, and gave the defendant a receipt for the balance proved due, and which he then paid over and took a receipt from her.

The Court held, that, having availed herself of the order of the Court, she could not afterwards, on the ground of money having been improperly retained, maintain an action as for money had and received.

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10. *Concerning License, Value of*†.

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11. *Concerning Misrepresentation.*

POPE *v.* WRAY, H. T. 1839. Ex. 4 *M. & W.* 451.

Money had &c. lies to recover back money paid under a misrepresentation.

THE defendant obtained payment of an entire demand on a false representation of default in the plaintiff's agent honouring a bill given for the amount.

The Court held, that it was not necessary for the plaintiff previously to tender back the bill; the right of action accruing on the payment of the money upon the misrepresentation of the facts.

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12. *Concerning Mistake, Payments under*‡.

* An action for money had and received lies against a party who sues without authority. (*Carman* v. *Edwards,* M. T. 1840, N. P., 9 C. & P. 596).

† Where a party carrying on the wine and spirit business assigned his premises by way of mortgage, with all licenses, &c., to the plaintiff, which was shortly afterwards forfeited on account of some irregularities by the occupier; the plaintiff afterwards sold the mortgaged premises under a power in the mortgage-deed without obtaining a new license, and which the defendant, the assignee of the mortgagor, afterwards obtained, which he sold to a subsequent occupier:—Held, that the license so obtained by the defendant was not the license the defendant conveyed to the plaintiff, and that the interest having ceased when the premises were sold in discharge of the mortgage, the sum received by the defendant on the sale of the license was not money received to the plaintiff's use. (*Manifold* v. *Morris,* H. T. 1839, C. P., 5 Bing. N. S. 420; S. C. 7 Scott, 404).

‡ Money paid under a mistake of facts may be recovered back. (*Lucas* v. *Worsack,* 1833, N. P., 1 M. & Rob. 293). As where C., an agent, indorsed a bill (in ignorance of his authority being determined by the death of his princi-

13. *Concerning Notice, Payment after.*

HASTELOW *v.* JACKSON, E. T. 1828. K. B. 8 *B. & C.* 221; S. C. 2 *M. & Ry.* 209.

A stakeholder is liable, after notice not to pay over, if the deposit be on an illegal contract*.

Two parties to a boxing match placed the stakes in the hands of a third party to abide the event; the battle was fought; each party claimed to be the winner; the matter was referred to an umpire, who decided in favour of one, the other still persisted in claiming the whole, and gave notice to the stakeholder not to pay it over, the stakeholder however afterwards paid it over according to the umpirage.

The Court held, that the party thus giving notice was entitled to recover back his deposit from the stakeholder: 1. Where two parties make an illegal contract upon which one pays money to the other, and, before the happening of the event provided for, the party who has paid money rescinds the contract, he may recover back from the other party the money so paid. 2. But, after the event provided for has happened, money so paid by one party to the other cannot be recovered back. 3. If, however, money be placed in the hands of a stakeholder upon such an illegal contract, it may be recovered any time before it be actually paid over by the stakeholder, although the event may have been decided, and although the party who deposited the money may have claimed the whole benefit of the illegal contract.

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14. *Concerning Parish Money*†.

pal in India) to A. and B., who received the amount from the plaintiffs, the acceptors:—Held, that the latter were entitled to recover back the amount, either as money had and received by A. and B. to their use, or as money paid by them to C.'s use. (*East India Company* v. *Prince*, 1 Ry. & M. 407). A. accepted a bill of exchange for 15*l.* drawn on him by B., which B. indorsed to C., and which was dishonoured. B. owed A. a balance of 102*l.*, and several months after, on B. and C. balancing their accounts, a small balance was found to be in favour of B., which was paid by C. to B., and the bill given back to B., after this M. desired Messrs. E. & W. to bring an action on the bill in the name of C., and gave them the bill and a letter from A. to C. on the subject of it. Messrs. E. & W. commenced an action against A. at the suit of C., and A. paid them the amount of the bill and interest, and also the costs. It was proved by C. that he had never given any authority for the bringing of this action:—Held, that A. might recover back the amount of the bill, and interest and costs, from Messrs. E. & W., in an action for money had and received; and that their having acted bonâ fide on the belief that they had the authority of C., and the fact of their having paid over the amount of the bill and interest to M., were no grounds of defence to such an action. (*Carman* v. *Edwards*, M. T. 1840, N. P., 9 C. & P. 596).

* A. gave a sum of money into the hands of B. to pay to C.; B. had not paid it over to C.:—Held, that if C. had not consented to receive this sum of B., A. might countermand the authority and recover it back from B. (*Owen* v. *Bowen*, M. T. 1829, N. P., 4 C. & P. 93).

† Where the defendant, an overseer, had agreed with the plaintiff and the pauper, his tenant, to pay over part of the parochial relief:—Held, that the plaintiff could not maintain an action for money had and received for the parish money in his hands, the money not being expressly received for the pauper. (*Blackledge* v. *Harman*, 1834, N. P., 1 M. & Rob. 344).

15. *Concerning Power of Attorney.*

MARSH *v.* KEATING, H. T. 1834. C. P. 1 *Bing. N. S.* 198.

The action lies where stock has been transferred under a forged power.

IN an action for money had and received, it appeared that stock had been transferred under a forged power of attorney—

The Court held, that the proprietor might maintain an action for money had and received against parties into whose hands the proceeds of the stock had come, (affirming the judgment below).

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16. *Concerning Return of Money on a certain event*.*

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17. *Concerning unsaleable Bonds.*

YOUNG *v.* COLE, M. T. 1836. C. P. 3 *Bing. N. S.* 724.

A broker who sells for another that which is unmarketable may maintain money had &c.

THE plaintiff, a broker, sold for the defendant foreign bonds, which turned out, for want of a proper stamp, to be unmarketable, and the plaintiff, according to the usuage of the Stock Exchange, took them back.

The Court held, that, the plaintiff having paid over the proceeds, he was entitled to recover back the amount as for money had and received; having an authority to sell, he had an implied one to sell also, according to the usage, and to rescind the sale on the bonds turning out not to be what they were represented to be.

II. RELATIVE TO BY AND AGAINST WHOM MAINTAINABLE.

WHARTON *v.* WALKER, E. T. 1825. K. B. 4 *B. & C.* 163.

A. agreed with B. that he should receive a certain sum from C., his tenant; there was no communication between B. and C.:—Held, that received did not lie by B. against C.†

A. BEING indebted to B. gave an order on his tenant, C., for payment out of the rent next due, which the tenant received, but without any communication with B.; and in settling his rent with A. had it allowed, and paying the difference took A.'s receipt for the whole rent—

The Court held, that B. could not maintain assumpsit for money had &c., or on an account stated, on the grounds, 1st, that the debt from A. to B. was not extinguished by anything that had passed; and 2ndly, that in fact no money was ever had and received by the defendant to the use of any other person.

* Where horses were sold for 80*l.*, to allow 10*l.* if returned within a month, which was done:—Held, that the purchaser might maintain an action for the money as had and received to his use, it being held by the defendant on the terms of giving it back if the plaintiff were eventually entitled to receive it. (*Hurst* v. *Orbell*, E. T. 1838, Q. B., 3 N. & P. 237).

† The brokers to certain ship-owners charged their employers certain sums of money for work done to their ships, under the head of stevedore. The labour of a stevedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the ship-owners were aware that the brokers charged them more than they paid the work-

HATSALL *v.* GRIFFITH, E. T. 1834. Ex. 2 *C. & M.* 679.

So, money had &c. will not lie by one on a joint retainer;

IN an action for money had &c., it appeared that two of three part owners of a ship authorized a party to sell the ship, which he did, and paid the two their respective shares of the purchase-money—

The Court held, that the third could not maintain a separate action, it being a joint employment of such agent.

CLARK *v.* DIGNUM, M. T. 1838. Ex. 3 *M. & W.* 478.

nor against an attorney for money received as such.

IN an action for money had and received, it appeared that the defendant, an attorney for A., who was really entitled, brought an action in the name of the plaintiff, and recovered, and the jury having found that the money was recovered by him for A.—

The Court held, that the plaintiff could not maintain an action against the attorney for money had and received on the settlement of the claim.

III. RELATIVE TO THE DECLARATION*.

IV. RELATIVE TO THE PARTICULARS OF DEMAND.

ROBERTS *v.* ROWLANDS, M. T. 1838. Ex. 3 *M. & W.* 543.

The defendant is entitled to a full particular,

IN assumpsit for money had and received to recover back the deposit, on the ground of objection to the title—

The Court will oblige the plaintiff to give a particular of all objections to the abstract arising upon matter of fact, but not of law, which they must find out themselves.

DAVENPORT *v.* DAVIES, E. T. 1836. Ex. 1 *M. & W.* 570; S.C. 1 *T. & G.* 931.

and the particulars are binding.

IN assumpsit for money had and received, alleged in the particulars to be sums deposited with the defendant as stakeholder of a wager which the plaintiff had won—

The Court held, that the plaintiff failing in proof of this, he could not even recover the amount of his own deposit, upon mere proof of having demanded back his stake before paid over, being a totally different issue to that stated in the particulars of demand.

man, but made no objection, on account of their zeal and diligence:—Held, that one of the workmen, under such circumstances, could not maintain an action for the larger sums received by the broker, as money had and received to his use. (*Wilson* v. *Cohen*, T. T. 1826, N. P., 2 C. & P. 363). So, where an overseer had stopped part of a pauper's parochial weekly allowance, and engaged to pay it over to the landlord of the pauper, in pursuance of an undertaking between the three:—Held, that the landlord could not support assumpsit for money had and received against the overseer. (*Blackledge* v. *Harman*, 1834, N. P., 1 M. & Rob. 344).

* Upon a contract of sale and return, with a certain sum to be paid for hire if return should be made, the money received by the seller becomes money had and received to the use of the other party, if return is made, and may be recovered under a count for money had and received. (*Hurst* v. *Orbell*, E. T. 1838, Q. B., 3 N. & P. 237).

V. RELATIVE TO THE PLEAS.

HAMMOND *v.* TEAGUE, E. T. 1830. C. P. 6 *Bing.* 197; S. C. 3 *M. & P.* 474.

Under non assumpsit, the defendant may shew he is a shareholder with the plaintiff and others*.

IN assumpsit for money had and received, the defendant having obtained a rule to plead the general issue; and, secondly, that the money was advanced and received, and applied to the purposes of a mining company, of which the defendant was one of the partners and proprietors, together with the plaintiff and others.

The Court held, that, as the whole might be given in evidence under the general issue; and the plea was calculated to perplex the plaintiff, and raise a doubt whether he could reply to all or part only of the matters pleaded, the rule ought to be refused.

VI. RELATIVE TO THE REPLICATION.

SOLLY *v.* NEISH, T. T. 1835. Ex. 2 *C., M. & R.* 355; S. C. 4 *D. P. C.* 248.

Where the defendant derives authority from the plaintiff, de injuriâ cannot be replied.

IN assumpsit for money had &c., plea, as to the sum stated to have been received, that it was the proceeds of goods consigned by the plaintiffs and others jointly, as a security for money which the defendant might advance to the latter; and that, without knowledge of the plaintiffs' interest, he made advances to them on the security of the goods, which he afterwards sold, and offered to set off the amount of such advances against the plaintiffs' claim. Replication, de injuriâ; and a new assignment, that the action was for monies received by defendant for other goods, and on plaintiffs' account.

The Court held, that the plea would have been bad on special demurrer; and that the plea claiming an interest and deriving authority from the plaintiffs, the replication was also bad.

VII. RELATIVE TO THE EVIDENCE.

PARRY *v.* ROBERTS, M. T. 1835. K. B. 5 *N. & M.* 669; S. C. 3 *Ad. & E.* 118.

The defendant's admission is sufficient to render him liable to an action for money had &c.;

THIS was an action for money had and received, and other common counts. At the trial, it appeared by the defendant's admission that the plaintiff delivered to the defendant some money in notes, to be delivered to a certain creditor of plaintiff's house in Liverpool; that the defendant, unfortunately for himself, went into a brothel, where he lost the money. It was contended, upon this evidence,

* In an action of assumpsit for money had and received to the plaintiff's use, the defendant cannot, under a plea of the general issue, give in evidence that the money was received in respect of an illegal wager; (*Martin* v. *Smith*, E. T. 1838, C. P., 6 D. P. C. 639; S. C. 4 Bing. N. S. 436); but in assumpsit for money had and received, it is open to the defendant, under the plea of non assumpsit, to shew that, although the money in question was received by him, it was not received by him for the use of the plaintiff, but for the use of another person. (*Clark* v. *Dignam*, M. T. 1838, Ex., 3 M. & W. 478).

that the plaintiff ought to be nonsuited; that the plaintiff had mistaken the form of action; but the learned Judge before whom it was tried, thinking that the evidence was sufficient to support the count for money had and received, a verdict was found for the plaintiff, with leave to defendant to move to enter a nonsuit. A rule having been obtained pursuant to the leave reserved—

Lord *Denman*, C. J.—It was quite unnecessary to prove negligence, in order to support the action. The defendant admits the receipt of the money, and that it has not been repaid to the plaintiff. That is a sufficient primâ facie case; and the defendant, in answer, must shew that he has lost it in some way for which he is not responsible.

SCOTT *v.* MILLER, M. T. 1836. C. P. 3 *Bing. N. S.* 811.

but a bill of exchange is not evidence of money had and received.

DEFENDANT, captain of plaintiff's ship, drew a bill on plaintiff's agent for expenses incurred on account of the ship; and plaintiff's agent having paid the bill, plaintiff afterwards brought an action for money had and received to his use against the captain, and at the trial proved payment only of the bill by his agent, without giving evidence that any of the sums for which the bill was drawn had ever reached defendant's hands.

The Court held, that the bill of exchange was not evidence of money had and received to plaintiff's use.

ATKINS *v.* OWEN, M. T. 1834. K. B. 4 *N. & M.* 123; S. C. 2 *Ad. & E.* 35.

A banker's clerk cannot be asked questions with respect to a bill not produced.

IN assumpsit for money received, being the amount of a bill which the defendant had obtained and paid into his banker's—

The Court held, that the bill not being produced, nor any account of it given, the banker's clerk could not be asked as to a bill paid in by the defendant, answering to it in description, and credited to him. It afterwards appearing that the bill was in Scotland, and not within the jurisdiction, and the plaintiff not being able therefore to compel the production of it, a new trial was granted, on payment of costs.

VIII. RELATIVE TO THE WITNESSES.

WILLIAMS *v.* WILLIAMS, H. T. 1840. Ex. 8 *D. P. C.* 220; S. C. 6 *M. & W.* 170.

Wife of bankrupt not competent to prove the payment by the bankrupt, in an action by his assignees.

IN an action by assignees, for money received to their use by a party from the bankrupt, who had not obtained his certificate, but had released the assignees—

The Court held, 1st, that the wife of the bankrupt was not a competent witness to prove the payment by the bankrupt to the defendant after the bankruptcy; the bankrupt, the definite surplus not being ascertained, having no releasable interest, and the verdict, if the assignees succeeded, going to increase her interest in the surplus: and 2ndly, that the verdict in the action could not be used in an action by the creditor against the bankrupt, as res inter alios acta, and so no countervailing interest to render the witness indifferent.

IX. RELATIVE TO NEW TRIAL*.

Money Lent†.

See, also, tit. *Gaming.*

REGIL *v.* GREEN, E. T. 1836. Ex. 1 *M. & W.* 328.

In an action for money lent, the replication cannot traverse two substantive grounds of defence.

THIS was an action of debt for monies lent &c.; plea, that the money was lent for the purpose, and was paid for the repairs of a ship in a foreign port, and not on the liability of the defendant; and then stated a bottomry bond, executed to the plaintiff to secure exorbitant interest; replication, alleging, first, that the money was lent on the defendant's liability; secondly, denying the agreement; and lastly, the execution of such bond.

The Court held the replication bad, as tendering issues on several matters, the first putting in issue the substantial ground of defence.

Money Paid.

I. RELATIVE TO WHEN OR WHEN NOT MAINTAINABLE, p. 680.

II. RELATIVE TO BY AND AGAINST WHOM MAINTAINABLE, p. 683.

III. RELATIVE TO THE PLEAS, p. 683.

IV. RELATIVE TO THE EVIDENCE, p. 684.

I. RELATIVE TO WHEN OR WHEN NOT MAINTAINABLE.

KEMPSON *v.* SAUNDERS, M. T. 1827. C. P. 4 *Bing.* 5; S. C. 12 *Moore*, 44; S. C. 2 *C. & P.* 366.

Money paid lies for shares sold under an alleged title,

THE plaintiff had purchased shares of defendant in a projected railway company, upon which nothing was afterwards done, it being one of the original terms, that nothing should be done without the

* Where a party sued for money had and received rested his defence on his having obtained the money bonâ fide, in satisfaction of an equitable claim, and the plaintiff at the trial merely endeavoured to impeach the fairness of the receipt, and the claim generally, and the jury found for the defendant, the Court refused to entertain a motion for a new trial, made on the ground that, admitting the fairness of the transaction, the defendant appeared, upon the plaintiff's case at the trial, to be not entitled to retain more than a part. (*Moore* v. *Eddowes*, T. T. 1834, K. B., 2 Ad. & E. 133).

† Whenever money is lent for the express purpose of enabling the borrower to do some act prohibited by law, such as playing at a prohibited game, the lender cannot recover it back in an action for money lent. (*M'Kennell* v. *Robinson*, M. T. 1837, Ex., 3 M. & W. 434).

sanction of the legislature first obtained, and therefore nothing illegal in which the plaintiff was concerned.

The Court held, that the defendant having sold what turned out to be of no value, with an alleged title, the plaintiff might recover back the money paid.

GRISSELL *v.* ROBINSON, H. T. 1836. C. P. 3 *Bing. N. S.* 10; S. C. 3 *Scott*, 329.

AFTER a refusal by the Court of Chancery to compel performance of an oral agreement for a lease by testator with the defendant, part of the consideration being paid, his executors consented to grant one upon the same terms, and a lease was accordingly prepared by the attorney of the plaintiffs' lessors, and his bill paid, but the lease was not delivered over, the remainder of the consideration not having been paid—

The Court held, that the plaintiffs were entitled to recover the amount of charges for preparing the lease, as for money paid to the defendant's use, and to sue in their personal character.

or for the charges in preparing a lease not carried into effect;

HENNINGS *v.* ROTHSCHILD, H. T. 1828. C. P. 4 *Bing.* 315; S. C. 12 *Moore*, 579; *but semble overruled* S. C. 9 *B. & C.* 470.

BY the original terms of advancing the money on the N. loan deposits were to be paid down, and the residue at a future day, when certificates were to be given; but no stipulation was made that on default in payment of such residue the deposits should not be forfeited—

The Court held, 1st, that, upon failure of complying with the conditions, and the contract having been put an end to by the one party after material alterations from the original terms consented to by him, the other had a right to recover back the deposit paid, although by such failure, if any loss or inconvenience had been sustained, a cross action might have been maintained; and 2ndly, that the original purchaser having transferred the receipts, and the holder having in subsequent transactions with the defendant, the contractor, been treated as the person who originally subscribed and for whom he held the deposits, that such holder might maintain the action.

and if there be no stipulation to forfeit a deposit on non-completion, it may be recovered back; but, *semble*, overruled in K. B.

MILNES *v.* DUNCAN, E. T. 1827. K. B. 6 *B. & C.* 671.

THE plaintiff, who would have been discharged by the laches of the holder of a bill, yet upon the allegation by the latter that the bill was void for want of a proper stamp, and upon a threat of being sued, paid the amount. Upon its being discovered afterwards by the plaintiff that the bill in fact had been drawn in Ireland and the stamp sufficient—

The Court held, that, having paid the money under a mistake of the fact, he was entitled to recover it back.

So, money paid under a mistake as to a fact.

CATTON *v.* SIMPSON, H. T. 1838. Q. B. 8 *Ad. & E.* 136.

DEFENDANT gave a joint and several promissory note to A., plaintiff signing as defendant's surety; afterwards, A. pressing defendant for payment, time was allowed, upon L. adding his sig-

Or not voluntary,

nature as additional security. No new stamp was put on the note. Plaintiff afterwards paid A. the money.

The Court held, that he might sue defendants for money paid, and that the payment of the money was not voluntary, the addition of L.'s name not annulling plaintiff's original liability on the note.

SHAW *v.* WOODCOCK, T. T. 1827. K. B. *7 B. & C.* 73.

or a compulsory payment, may be recovered back,

THE plaintiff obtained a sum in order to obtain possession of certain policies of insurance belonging to him, and which were refused to be delivered up by the defendants, under a claim of lien.

The Court held, that it was not to be deemed a voluntary, but a compulsory payment, and might be recovered back.

DUKE DE CADAVAL *v.* COLLINS, E. T. 1836. K. B. *6 N. & M.* 324; S. C. 4 *Ad. & E.* 858.

if not in the ordinary sense of under process of law;

THE plaintiff had been arrested upon a claim which the jury found that he knew not to be well founded; and the plaintiff, not being prepared with bail, had paid a sum to the defendant, and agreed to put in bail to the action, which was not afterwards proceeded in.

The Court held, that it was not a payment in the ordinary sense under process of law, and might be recovered back; and would not prevent the plaintiff also maintaining an action for the malicious arrest.

HAMLET *v.* RICHARDSON, M. T. 1832. C. P. *9 Bing.* 644; S. C. 2 *M. & Scott,* 811.

but under threat of legal proceedings, cannot be recovered back:

IN an action for money paid, the plaintiff, as he alleged, paid money by mistake upon a charter-party transaction; but, as it appeared, after notice, that it would be sued for, and process issued by the defendant to recover it—

The Court held, that the plaintiff was not entitled to recover it back.

SPENCER *v.* PARRY, E. T. 1835. K. B. *4 N. & M.* 770; S. C. 3 *Ad. & E.* 331.

and money paid will not lie, where the remedy is on a special contract*.

UPON an agreement of demise by the plaintiff to the defendant, at a certain rent, clear of land-tax and of all parochial taxes, for which, by a local act, the landlord or receiver was also made liable, the defendant having paid the rent and quitted, leaving the land-tax and parochial taxes unpaid, which having been distrained for, the plaintiff had paid.

The Court held, that the remedy was upon the special agreement, and that he could not maintain the action for money paid to the defendant's use, the latter not being liable to pay the money to any one but the plaintiff, and that by virtue of his agreement:—Held, also, that an offer of a cognovit after action was brought was not sufficient to support the count on an account stated.

* But the rule that a tort-feasor cannot recover upon a promise to indemnify, made by the person at whose request the tortious act is committed, is confined to cases in which the act is of an obviously illegal character. (*Betts* v. *Gibbins*, M. T. 1836, K. B., 4 N. & M. 64; S. C. 2 Ad. & E. 57).

II. RELATIVE TO BY AND AGAINST WHOM MAINTAINABLE.

GINGELL *v.* GLASSCOCK, E. T. 1832. C. P. 8 *Bing.* 86; S. C. 1 *M. & Scott*, 125.

THE plaintiff having hay sent to him for sale, paid the price before he had received it, and directed the defendant's servant, who brought the hay, to proceed with it to the purchaser's, and on the way, by a trick, it was obtained from him by a stranger. Upon the purchaser refusing to pay for it—

The Court held, that the plaintiff was entitled to recover back the sum he had paid, the servant being, in fact, the agent of the defendant.

Where an article is paid for, and servant of the vendor improperly parts with it, money paid lies against the seller*.

ALEXANDER *v.* VANE, T. T. 1836. Ex. 1 *M. & W.* 511; S. C. 1 *T. & G.* 865.

THE plaintiff, being present at an order given by the defendant for goods, said he would pay, if the latter did not, and which he afterwards did.

The Court held, that it must be taken to have been made with the defendant's authority; and no countermand being shewn, the plaintiff was entitled to recover the amount as for money paid to the defendant's use.

So A., who promises to pay if B. does not, may sue B.;

M'ARTHY *v.* COLVIN, E. T. 1838. Q. B. 1 *P. & D.* 429.

THE agents of the plaintiff in England were directed by him to pay, through the defendants, money to be placed to his credit in India, which was done, and an entry made in the defendants' books to the credit of their correspondent, to whom they sent advice to account for it to the plaintiff. Before the letter of advice reached their correspondent the latter had failed, having drawn on the defendants, between the date of such letter and the failure, bills which the defendants had accepted to an amount not exceeding the amount paid in by the plaintiff:—Held, that the defendants having only acted as directed, and the situation in which they stood towards their correspondents altered, the plaintiff could not maintain assumpsit against them for the money so paid in.

but money paid does not lie against an agent, whose situation is altered.

III. RELATIVE TO THE PLEAS.

FRANCIS *v.* BAKER, E. T. 1839. Q. B. 2 *P. & D.* 569.

To assumpsit for money paid to the use of defendant, plea, that the payment was made for certain shares which plaintiff subsequently

The defendant cannot plead a

* And an action for money paid to the use of the defendant may be maintained by a sheriff's officer, who has paid the debt and costs on an attachment against the sheriff, bail above not having been put in through the misconduct of the defendant in imposing insufficient bail on the sheriff, and the defendant having promised to indemnify the officer both before and after the payment; but the officer cannot recover beyond the debt. (*White* v. *Leroux*, 1829, N. P., 1 M. & M. 347).

subsequent tortious act after contract complete;

received, and tortiously misapplied, and converted to her own use, and that the defendant had lost all benefit therefrom. On demurrer—

The Court held the plea bad, the plaintiff's contract having been once completed, the subsequent tortious act would only be the subject of a cross action.

GREGORY *v.* HARTNOLL, H. T. 1836. Ex. 1 *M. & W.* 166; S. C. 4 *D. P. C.* 695; S. C. 1 *T. & G.* 303.

and a plea that money was paid by the plaintiff's misconduct, and no advantage to the defendant, amounts to the general issue*.

IN assumpsit for money paid, plea, that it was paid by the plaintiff as part of the damages and costs against the plaintiff, as part owner of a vessel with the defendant, for loss by negligence of mariners and servants, and in part by plaintiff's misconduct; and further, that the defendant did not concur with the plaintiff in the employment of the vessel, nor did in any way participate in the advantage.

The Court held the plea bad on demurrer, as amounting to the general issue.

IV. RELATIVE TO THE EVIDENCE†.

Money, Payment of into Court. See tit. *Payment of Money into Court.*

Mortgage.

I. RELATIVE TO WHAT IS A MORTGAGE, p. 685.

II. RELATIVE TO WHAT MAY BE THE SUBJECT OF, p. 685.

III. RELATIVE TO THE MODE OF CREATING, AND CONSTRUCTION OF MORTGAGE DEED, p. 685.

* To assumpsit for money paid, the defendant pleaded as to 500*l.*, parcel &c., that he was possessed of a bill of exchange drawn by him upon and accepted by C. M. for payment of 500*l.*, three years after date; and thereupon, in consideration that the defendant would indorse the said bill to the plaintiffs, they agreed to pay and lay out for him 500*l.* in such sums as he should require:—Held bad, as amounting to the general issue. (*Maude* v. *Meesham*, E. T. 1338, Ex., 6 D. P. C. 570; S. C. 3 M. & W. 502).

† The plaintiff being the representative of a deceased officer of artillery, of which corps the defendants were paymasters; they delivered to him an account current, in which they acknowledged themselves to have received, from the year 1806 to the year 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806:—Held, that they could not, in 1821, be permitted to say that this admission was by mistake, as, in 1816, the Board of Ordnance had announced that, by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it; this announcement of the Board never having been communicated to the deceased by the defendants till the year 1821. (*Skyring* v. *Greenwood*, M. T. 1824, N. P., 1 C. & P. 517).

IV. RELATIVE TO THE RIGHTS OF THE MORTGAGOR, p. 687.

V. RELATIVE TO THE RIGHTS OF THE MORTGAGEE, p. 688.

VI. RELATIVE TO THE LIEN CONNECTED WITH, p. 690.

VII. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) EJECTMENT, p. 690.
(*b*) DECLARATION, p. 691.
(*c*) PLEAS, p. 691.
(*d*) EVIDENCE, p. 692.
(*e*) WITNESSES, p. 692.
(*f*) DAMAGES, p. 693.
(*g*) COSTS, p. 693.
(*h*) STAYING PROCEEDINGS, p. 693.

I. RELATIVE TO WHAT IS A MORTGAGE*.

II. RELATIVE TO WHAT MAY BE THE SUBJECT OF†.

III. RELATIVE TO THE MODE OF CREATING, AND CONSTRUCTION OF MORTGAGE DEED.

REED *v.* WILMOT, T. T. 1831. C. P. 7 *Bing.* 577; S. C. 5 *M. & P.* 553.

One stamp is sufficient though in reality to secure the debt of several persons‡.

A MORTGAGE deed had been executed for the payment of a single sum, although in reality to secure the debts of three persons, but not giving them a separate security—

The Court held, that it was not necessary that the ad valorem duty should be calculated in respect of each separate debt.

* A. gave an undertaking to pay C. 35*l.* upon the execution of a mortgage from S. to B. S. conveyed to B. the property intended to be the subject of the mortgage by assigning to him in trust to sell it, and for B. to pay himself the sum that he had advanced, and to pay 22*l.* to C. as part of his claim, and, after other payments which were specified, to pay the surplus to S. C. was not only aware of this arrangement, but was at one time intended to have been the trustee under the deed of assignment:—Held, that this conveyance was a mortgage within the meaning of the undertaking; but that C. could not recover in an action upon the undertaking the 22*l.* mentioned in the deed, as he had allowed that to become a subject of the trusts. (*Crook* v. *Beetham*, M. T. 1834, N. P., 6 C. & P. 761).

† Under the mortgage of a mill, held, that the stones, tackling, and implements necessary for working the mill, although moveable, passed to the mortgagee. (*Place* v. *Fagg*, H. T. 1829, K. B., 4 M. & Ry. 277).

‡ If an instrument containing a mortgage be also a promissory note, it may still be stamped with a mortgage stamp after the execution, provided it has a pro-

DOE *d.* BARTLEY *v.* GRAY, E. T. 1835. K. B. 4 *N. & M.* 719; S. C. 3 *Ad. & E.* 719.

On a further advance the stamp is on that sum.

A MORTGAGE term was transferred upon a further advance, and the fee conveyed as a further security—

The Court held, that the deed required only an ad valorem stamp on the further sum advanced.

DOE *d.* JARMAN *v.* LARDER, T. T. 1836. C. P. 3 *Bing. N. S.* 92; S. C. 3 *Scott*, 407.

There was a mortgage of premises held for 130*l.*, with power for the mortgagee to expend 70*l.* for a renewal:—Held, that a 2*l.* stamp was sufficient.

THE mortgage-deed, which was to secure the payment of 130*l.*, contained a covenant whereby the mortgagor bound himself to renew without imposing any restriction or qualification as to the sum which might be demanded by the governors of the hospital for such renewal. It also contained a covenant by which the mortgagee was enabled (in case of failure or neglect on the part of the mortgagor) to renew, and the extent of his expenditure for the purpose of attaining such object was limited to the sum of 70*l.* The mortgage-deed had a stamp of 2*l.*, which by the schedule of 55 Geo. 3, c. 184, was sufficient to cover the two sums of 130*l.* advanced on the mortgage, and of 70*l.* to which the mortgage was limited, if it were the mortgagee who renewed.

The Court held, that the deed required a 2*l.* stamp only, as "the total amount of the money secured, or to be ultimately recoverable thereupon," is not "uncertain and unlimited" within the meaning of the statute 55 Geo. 3, c. 184, schedule "Mortgage."

DOE *v.* BRAGG, M. T. 1838. Q. B. 3 *N. & P.* 644; *supporting* DOE *v.* SNAITH, E. T. 1832. C. P. 8 *Bing.* 146; *and* PRUESSING *v.* ING, H. T. 1821. K. B. 4 *B. & Ald.* 204.

The stamp need not cover the rates and taxes.

ON a mortgage-deed the ad valorem stamp extended only to the amount of the principal, and not of the rates and taxes which might be charged on the premises, and for which also the mortgage was to be a security.

The Court held that it was sufficient, and not requiring a 25*l.* stamp as on a bond-deed securing an indefinite sum.

WILKINSON *v.* HALL, M. T. 1836. C. P. 3 *Bing. N. S.* 508; S. C. 4 *Scott*, 301.

The subsequent part of the deed may control a prior part*.

PLAINTIFF mortgaged land in fee, with a proviso for redemption on payment of principal in June, 1833; but it was agreed that the mortgagee should not call in the principal till 1840, if interest were regularly paid in the meantime, and that the mortgagor should hold the premises and take the rents, issues, and profits for his own use until default should be made in payment of principal and interest as aforesaid.

missory note stamp on it at the time it is executed. (*Wise* v. *Charlton*, T. T. 1836, K. B., 4 Ad. & E. 786).

* On the transfer of a mortgage for £10,000, with an additional advance of £4000, it was proved that the £10,000 were paid in bank-notes by the transferee to the original mortgagee, and the £4000 by a cheque to the mortgagor,

The Court held, that, although by the first part of the deed the fee was vested in the mortgagee, the subsequent operated as a redemise of the premises to the mortgagor until 5th December, 1840, provided the interest was regularly paid in the meantime.

IV. RELATIVE TO THE RIGHTS OF THE MORTGAGOR.

RIGHT *d.* JEFFERYS *v.* BUCKNELL, T. T. 1831. K. B. 2 *B. & Ad.* 278.

Under circumstances the mortgagor may dispute the title of the mortgagee.

A PERSON who had but an equitable interest professed to convey by lease and release by way of mortgage to A. In the recital it was stated that he was legally "or equitably" entitled; and in the covenants for title he covenanted that he was lawfully "or equitably" seised in fee, and his equitable title was to the fee. He afterwards acquired the legal estate; and he then conveyed by way of mortgage for valuable consideration to B., who had no notice of the prior mortgage. B. obtained possession, and upon ejectment by A.—

The Court held, that although A. and B. claimed under the same person, B. was not estopped from setting up a legal estate against the conveyance to A., as the terms of the recital and covenant to A. were satisfied by the conveyance to him.

DOE *d.* ROBY *v.* MAISEY, M. T. 1828. K. B. 8 *B. & C.* 767.

The mortgagor is a tenant at sufferance.

IN ejectment by mortgagee against mortgagor, it appeared that the latter had suffered the former to remain in possession.

The Court held, that a mortgagor remaining in possession is at all events nothing more than a tenant at sufferance, and is liable to be treated as a trespasser at the option of the mortgagor.

GOODTITLE *d.* BAKER *v.* MELBORN, M. T. 1837. Ex. 2 *M. & W.* 853.

Where commissioners may allot with the consent of the owner of the land, the consent of the mortgagor is sufficient*.

IN ejectment it appeared that commissioners were empowered, with the consent of the owners and proprietors, to exchange lands for allotments, such consent to be certified in writing; and by the award two pieces of land in mortgage were, with the consent of the mortgagor, exchanged, the commissioners stating on their award that the exchange was made with the consent of the mortgagor, but it did not state it to have been with the consent of the mortgagee.

The Court held it unnecessary, and that they would not presume it not to have been given; and the presumption was, that the commissioners had acted according to their jurisdiction, as the contrary did not appear. Held, also, that a letter to the mortgagee by the

as to which there was no proof that it was honoured:—Held, that the payment of the £10,000 was a sufficient consideration as against one claiming under a voluntary settlement. (*Doe* d. *Barnes* v. *Roe*, T. T. 1838, C. P., 6 Scott, 525).

* The stat. 6 Geo. 4, c. 16, s. 70, does not enable the assignees of a bankrupt mortgagor to revest the legal estate in themselves by tender or payment to the mortgagee after the day on which by the deed the mortgage becomes absolute in default of payment, though a tender of payment before the day will, under that section, vest the legal estate in them. (*Dunn* v. *Massey*, 6 Ad. & E. 479).

mortgagor, dated previous to an assignment under his insolvency, was admissible in evidence against the defendant, his assignee, and was to be presumed written at the period of its date until the contrary shewn.

V. RELATIVE TO THE RIGHTS OF MORTGAGEE.

DOE *d.* OLD *v.* VICKERS, E. T. 1836. K. B. 6 *N. & M.* 437; S. C. 4 *Ad. & E.* 782.

Where a mortgagor was ejected, and the lessor grants a new lease, it enures to the benefit of the mortgagee*.

IN ejectment, it appeared that the defendant had mortgaged the premises in question to the lessors of the plaintiff in fee in 1824. Subsequently, the Earl of Shrewsbury and the Earl of Berwick brought ejectment against the defendant, who was left in possession, each for an undivided moiety, when a verdict was taken, subject to the award of an arbitrator, who awarded that a lease should be executed by Lord Shrewsbury and Lord Berwick to the defendant of their undivided portions, which was accordingly executed. As to one undivided portion the defendant suffered judgment by default, and defended himself as to the other two-thirds by the production of his lease. The learned Judge held, that this lease enured to the benefit of the mortgagee, and could not be set up against him; and directed a verdict for the plaintiff.

The Court held, that the mortgagor could not set up the new lease as a defence to an action brought by the mortgagee.

DOE *d.* HIGGINBOTHAM *v.* BARTON, H. T. 1840. Q. B. 3 *P. & D.* 194.—S. P. ROGERS *v.* HUMPHREYS, H. T. 1836. K. B. 4 *Ad. & E.* 299.

A tenant is bound to pay his rent to the first mortgagee;

A TENANT let into possession previous to the mortgage subsequently paid rent to the mortgagee; but, after notice from a prior mortgagee, paid it to the latter.

The Court held, 1st, that, in ejectment by the former, he was not precluded from shewing such prior mortgage; and 2ndly, that the rent was properly paid to the first mortgagee, the payment not denying the title of the party by whom he had been put into possession.

DIXON *v.* WIGRAM, T. T. 1832. Ex. 2 *C. & J.* 613.

but a notice from a subsequent mortga-

THE first mortgagee had brought covenant on the deed, and received notice from a subsequent mortgagee not to deliver up the deed.

* If a person who has an estate borrows money on it upon mortgage, and the mortgagor afterwards grants a lease of the property to a tenant, E. G., for twenty-one years, that lease, being made after the mortgage, cannot be set up by the tenant to prevent the mortgagee from recovering the possession of the property, and the mortgagee may put the tenant out of possession by an ejectment, and the only remedy the tenant has for being thus put out of possession is against the mortgagor; but, if instead of the mortgagee driving the tenant out of possession, he consents to take the tenant as his tenant, the mortgagor will not thereby set up the twenty-one years' lease, but will make the tenant his tenant from year to year only. (*Doe* d. *Hughes* v. *Bucknell*, 1838, N. P., 8 C. & P. 566). Where the occupier of the soil agreed to make certain payments for a license to dig earth for bricks:—Held, that the mortgagee after notice was entitled to such payments as in the nature of rent. (*Ex parte Hawker*, 1829, Bankruptcy, Montagu & M. 247).

The Court held the case nevertheless within 7 Geo. 2, c. 20; and a rule granted that, upon payment of principal, &c., by the mortgagor, the plaintiff should deliver them up to him.

gee to a prior, not to deliver up the deeds, is not binding.

POPE *v.* BIGGS, H. T. 1829. K. B. 9 *B. & C.* 245; S. C. 4 *M. & Ry.* 193.

IN an action by the assignees of a mortgagor against a party who had been employed to receive the rent of lessees of premises demised since the mortgages, and pay over the interest to the mortgagee—

The Court held, that the mortgagees, by giving notice of the mortgage to the tenants, entitled themselves as well to bygone rents not actually paid over to the mortgagor by the agent, as to future accruing rents.

A notice by mortgagee to tenants applies to bygone rent;

EVANS *v.* ELLIOTT, H. T. 1839. Q. B. 1 *P. & D.* 256.

IN an action of replevin, it appeared that the mortgagor was permitted to continue in possession, and he granted a lease to the plaintiff in replevin subsequently to the mortgage. The mortgagee afterwards gave notice to the lessee that the mortgage money was unpaid, and distrained for half a year's rent, which was paid.

The Court held, that this did not by relation back constitute a tenancy, so as to entitle the mortgagee to distrain for rent antecedently due.

but a mortgagee has no right to distrain for rent antecedently due.

DOE *d.* PEARSON *v.* ROE, M. T. 1830. C. P. 6 *Bing.* 613; S. C. 4 *M. & P.* 437.

THE mortgagee did not swear that he was himself interested in the suit, and it appeared that he was merely set in motion for the purposes of some other person.

The Court held, that he did not bring himself within the 11 Geo. 2, c. 19, to entitle himself to defend as landlord.

A mortgagee must act on account of his own interest, to bring himself within the 11 Geo. 2.

SUMPTER *v.* COOPER, E. T. 1831. K. B. 2 *B. & Ad.* 223.

THE defendant was equitable mortgagee of houses of which he had obtained an assignment, but which had not been registered.

The Court held, that, having an equitable right to retain the rents against the mortgagor, he had also the same right against his assignees, although the assignment under the commission had been duly registered.

The mortgagee's rights against the mortgagor extends to the latter's assignee.

GOODTITLE *v.* NOTITLE, M. T. 1826. C. P. 11 *Moore*, 491.

THE mortgage deed provided, that, in case of default being made in the payment of interest, the mortgagee should have immediate power to sell.

The Court held, that on default the principal became the immediate debt, although the day of payment of the principal had not arrived; and therefore, that the Court had no power to relieve the mortgagor under the 7 Geo. 2, c. 20, but only on payment of the principal, interest, and costs.

Under a power of sale, on default of payment of interest, on that default the principal be comes due.

VI. RELATIVE TO THE LIEN CONNECTED WITH.

PRATT *v.* VIZARD, M. T. 1833. K. B. 2 *N. & M.* 455.

In the absence of contract, the attorney of an intended mortgagee has no lien on the deed.

THE defendants, as attornies of an intended mortgagee, received from their client the title-deeds delivered by the plaintiff, and who afterwards, in a letter to the mortgagee, said he would pay the expenses upon the mortgage going off.

The Court held, that it constituted no contract between the plaintiff and defendants, so as to give the latter a lien on the deeds until their bill of costs was paid.

VII. RELATIVE TO ACTIONS CONNECTED WITH.

(*a*) EJECTMENT.

DOE *d.* FISHER *v.* GILES, T. T. 1828. C. P. 5 *Bing.* 421; S.C. 2 *M. & P.* 749.

After forfeiture mortgagee may maintain ejectment against the mortgagor without notice to quit*;

BY the mortgage-deed it was covenanted, that, on default of payment on the day, the mortgagor might enter and proceed to sell, &c.

The Court held, that after that day the mortgagor was in the situation of a lessee whose term has expired, and no notice to quit was necessary to entitle the mortgagee to maintain ejectment; the payment of interest does not give any right to the possession of the land as payment of rent would do.

And see Partridge v. *Beere*, 5 *B. & Ald.* 604; *Keech* v. *Hall*, *Doug.* 21; *Moss* v. *Gallimore*, *Id.* 282; *and Birch* v. *Wright*, 1 *T. R.* 382.

DOE *d.* ROGERS *v.* CADWALLADER, T. T. 1831. K. B. 2 *B. & Ad.* 473; *doubting* DOE *v.* HALES, E. T. 1831. C. P. 7 *Bing.* 322.

unless he has acknowledged another party in possession.

THE mere receipt by the mortgagee of interest on the mortgage debt, unaccompanied with any acknowledgment on his part that either the mortgagor or his tenant was in lawful possession of the premises—

The Court held to be no defence to an ejectment, although the payment covered the period of the demise.

DOE *d.* GARROD *v.* OLLY, T. T. 1840. Q. B. 4 *P. & D.* 275.

To entitle the mortgagor to notice, the relation of landlord and tenant must be created.

THE mortgage-deed contained a covenant to surrender copyhold premises as a security for the debt, with power of sale and a clause that the mortgagor should, so long as he should continue in possession, pay a yearly rent by half-yearly payments; and that the mortgagee should have the usual remedies as landlords for rent, pro-

* Where it was sworn by a mortgagor that he had entered the usual appearance, the Court would presume that he had taken the proper steps to render him the defendant in the action, although it was not stated that he had entered into the consent rule. (*Doe* d. *Cox* v. *Brown*, E. T. 1838, B. C., 6 D. P. C. 471).

vided that the reservation of such rent should not prejudice the right of the mortgagee to enter and take possession in case of default made in payment of the money lent.

The Court held, that the relation of landlord and tenant was not created, so as to entitle the mortgagor to notice to quit before bringing ejectment.

DOE *d.* BARNEY *v.* ADAMS, H. T. 1832. Ex. 2 *C. & J.* 232; S. C. 2 *Tyrw.* 289.

THE mortgagee granted a lease and which the mortgagor confirmed, and there was a clause giving a power of re-entry to either in case of non-payment of rent or breach of covenant.

The party having the legal estate must bring the action.

The Court held, that it enured only to give the right of re-entry to the party having the legal estate, and that ejectment could not be supported upon a joint demise only.

DOE *d.* HUNT *v.* CLIFTON, T. T. 1837. K. B. 4 *Ad. & E.* 813.

THE lessor of the plaintiff proved a mortgage to him by one S. N. Stubbs in 1824 of his reversionary interest, expectant on the lives of two persons. The defendant, who was alleged to be Stubbs's tenant, but who defended for his benefit, produced a mortgage of the same premises in 1822 to a third party; but *Tindal*, C. J., held, that it could not be admitted in evidence to derogate from the effect of Stubbs's mortgage.

In ejectment by mortgagee, a defendant who defends for the mortgagor cannot set up a superior mortgage*.

And the Court, on a motion to enter a nonsuit, entertained the same opinion.

(*b*) DECLARATION†.

(*c*) PLEAS.

WATSON *v.* WALTHAM, M. T. 1835. C. P. 2 *Bing. N. S.* 485; S. C. 4 *N. & M.* 537; S. C. 2 *Ad. & E.* 485.

PREMISES were surrendered to a trustee for a mortgagee, with power, in default of payment, to sell when the mortgagee should

A plea justifying a sale on

* But A. having mortgaged to B. demises to C., reserving a power of re-entry, and afterwards mortgages to D. all his interest; C. may set up the title of D. as an answer to an ejectment brought by A. under the clause of re-entry. (*Doe* d. *Marriott* v. *Edwards*, H. T. 1834, K. B., 3 N. & M. 193; S. C. 5 B. & Ad. 1065).

† Where the mortgage-deed directed that the premises were to be re-conveyed, provided the mortgagor paid the money on the ——, and that the mortgagor covenanted to pay the —— at the time thereinbefore appointed for payment; the declaration alleged the breach that he did not pay at the time in the indenture mentioned:—Held, on demurrer, that it sufficiently appeared when the money was to be paid. (*Tildersley* v. *Stephenson*, T. T. 1834, C. P., 10 Bing. 545; S. C. 4 M. & Scott, 442). In debt on a covenant in a mortgage-deed, with a count for goods sold in L., the county into which it was sought to remove the venue; motion refused, there being no affidavit of merits, or that it would be necessary to call witnesses resident in that county. (*Anon.*, T. T. 1832, Ex., 2 Tyrw. 501).

default must shew a request and an entry for the purpose of the sale.

think proper; in trespass against the latter, plea stating that default was made, and that he entered, but did not allege that it was for the purpose of selling, nor any other request made to the trustee. On demurrer—

The Court held, that the deed did not operate as a license to enter, so as to afford a justification of the trespass, and leave to amend by putting on the record a request by the mortgagee refused.

(*d*) Evidence.

Doe *v.* Webber, T. T. 1830. K. B. 1 *B. & Ad.* 119.

A reference by one mortgagee not evidence against another, although present at one meeting*.

The defendant was proved to have got possession of the premises after the execution of a mortgage, upon an ejectment brought by him against the mortgagor then in possession, the cause being referred, and an award made in his favour; it appeared he had been in possession ever since, being upwards of seven years—

The Court held, that the proceedings were inadmissible as against the prior mortgagee, although shewn to have been present at one of the meetings, but to have taken no part in them.

Stobart *v.* Dryden, M. T. 1836. Ex. 1 *M. & W.* 615; S. C. 1 *T. & G.* 899.

So, a declaration of a deceased attesting witness not admissible.

In covenant upon a mortgage, upon plea non est factum, and issue whether the deed had been fraudulently altered by H., one of the attesting witnesses, who was dead; the other witness doubting his own signature and that of the defendant, and denying all knowledge of the transaction.

The Court held, that declarations of the deceased witness as to the supposed fraudulent alteration were inadmissible.

(*e*) Witnesses.

Doe *d.* Cuthbert *v.* Bamford, E. T. 1840. Q. B. 11 *Ad. & E.* 786; S. C. 3 *D. & D.* 498.

A second mortgagee is not a witness to prove fraud in the first.

In ejectment by a first mortgagee, the defendant, in order to prove that the mortgage was fraudulent, called a party, a second mortgagee, to prove the fraud—

The Court held the witness to have been properly rejected.

* In ejectment by the mortgagee of a freehold mortgage against the mortgagor, it is sufficient to put in and prove a deed of release, executed by the latter to the former, without putting in the lease for a year, provided the release state (in the usual way) that the premises are in the actual possession of the mortgagor by virtue of a lease for a year. (*Doe* v. *Wagstaff*, 1836, N. P., 7 C. & P. 477). Where, in order to prove interference by the mortgagee, and payment of repairs, the bill of the carpenter debiting the mortgagee, and receipts, were offered as evidence by him:—Held, inadmissible, there being no other evidence of the debt. (*Doe* d. *Gallop* v. *Voules*, 1833, N. P., 1 M. & Rob. 261).

(*f*) Damages.

BAKER *v.* BROWN, M. T. 1836. Ex. 5 *D. P. C.* 313; S. C. 2 *M. & W.* 199.

A VERDICT was inadvertently taken in an undefended cause for the mortgage principal, without the interest—

The damages cannot be increased without defendant's consent.

The Court held, that, although they might set aside the verdict, it could not increase the damages in the absence of the defendant.

(*g*) Costs.

DOE *d.* CAPPS *v.* CAPPS, E. T. 1837. C. P. 5 *D. P. C.* 633; S. C. 3 *Bing. N. S.* 768.

IN this case the mortgagee brought his action of ejectment for the recovery of the lands mortgaged, and the defendant, the mortgagor, in pursuance of the 7 Geo. 2, c. 20, s. 1, having brought into Court the principal monies and interest due on the mortgage, the question between the parties was, whether the costs given to the mortgagee by the same statute should be as between attorney and client, or as between party and party. The officer having taxed them as between party and party—

Where proceedings are stayed under 7 Geo. 2, the costs are to be taxed as between party and party*.

The Court held the taxation right.

(*h*) Staying proceedings†.

Murder.

I. RELATIVE TO THE MALICE AND INTENTION, p. 694.

II. RELATIVE TO THE MEANS AND CAUSES OF THE DEATH.

(*a*) Birth, concealment of, and ill-usage of children, p. 694.

* Where a mortgagee, being only a trustee for the lender, executed a declaration of trust to the latter:—Held, that the costs thereof could not be allowed against the mortgagor, not being a deed necessary for the security of the mortgagee. (*Martin* dem., *Baxter* ten., E. T. 1828, C. P., 5 Bing. 160; S. C. 2 M. & P. 240). Where, upon a cognovit being given, the conusor also executed a mortgage, as a security for the payment of the same sum and costs of the judgments, and of all other costs attending the same; the assignee of the conusor having brought an action disputing the conusor's right, and having succeeded upon a first trial, but failed on the second:—Held, that the conusor could not claim against the mortgagee those costs; but that the costs of the inquisition to the sheriff should be left to the officer. (*Doe* d. *Holt* v. *Roe*, T. T. 1830, C. P., 6 Bing. 447).

† On application, under 7 Geo. 2, c. 20, s. 1, to stay proceedings in an action on a bond, securing the principal and interest payable on a mortgage, if the mortgee seeks to obtain interest for the time between granting the rule, and the actual payment of the principal into his hands, he must make his claim to it at the time of discussing the rule, for he cannot afterwards sustain it. (*Jordan* v. *Chowans*, T. T. 1840, B. C., 8 D. P. C. 709).

II. RELATIVE TO THE MEANS AND CAUSES OF KILLING—*continued.*

(*b*) By fighting, p. 695.

(*c*) By medicine, p. 695.

(*d*) By neglect to provide for children or imbecile persons, p. 695.

(*e*) By suicide, agreement to commit, p. 696.

(*f*) Of unnatural offence, p. 696.

III. RELATIVE TO PARTICULAR PERSONS.

(*a*) Constables, sheriffs' officers, &c., p. 696.

(*b*) Gamekeepers, p. 696.

IV. RELATIVE TO THE INQUISITION, p. 697.

V. RELATIVE TO THE INDICTMENT, p. 697.

VI. RELATIVE TO THE EVIDENCE, p. 697.

VII. RELATIVE TO THE VERDICT, p. 698.

VIII. RELATIVE TO THE EXECUTION, p. 698.

IX. RELATIVE TO MURDER ABROAD, p. 698.

I. RELATIVE TO THE MALICE AND INTENTION*.

II. RELATIVE TO THE MEANS AND CAUSES OF THE DEATH.

(*a*) Birth, concealment of, and ill usage of children†.

* To reduce the offence to that of manslaughter, by shewing previous provocation, the jury must be satisfied that the act was done in consequence of such provocation, and not of previous malice. (*Reg.* v. *Kirkham*, 1837, N. P., 8 C. & P. 115). If two persons quarrel, and begin to fight on equal terms, when one, finding himself not equal to his adversary, runs away, and, being pursued, draws his knife, and when overtaken by his adversary stabs him, if death ensue this would be only manslaughter; and therefore, for such stabbing the party cannot be convicted capitally under Lord Ellenborough's Act; but if, before the conflict began, the party had drawn his knife in cold blood, in case death had ensued the offence would have been murder. (*Rex* v. *Kessal*, 1824, N. P., 1 C. & P. 437).

† Where the prisoner was only in the act of proceeding with the child towards the place of intended concealment, but stopped before the act was complete:—Held insufficient to constitute the offence, under 9 Geo. 4, c. 31, s. 14; (*Rex* v. *Snell*, 1836, N. P., 2 M. & Rob. 44); but if the body of a dead child be secretly buried, or otherwise disposed of by an accomplice of its mother, the accomplice acting as her agent in the matter, the mother of the child is punishable under the stat. 9 Geo. 4, c. 31, s. 14. (*Rex* v. *Douglas*, 1836, C. C. C., 1 Moo. C. C. 480; S. C. 7 C. & P. 644). Where the child is wholly produced, although still connected by the umbilical cord, the killing it will amount to murder. (*Reg.* v. *Reeves*, 1839, C. C. C., 9 C. & P. 25). A child must be actually brought into the world, in a living state, to be the subject of a charge of murder; but if it is wholly born, and is alive, it is not essential that it should have breathed; but the jury must be satisfied that the child was wholly born into

(*b*) By fighting*.

(*c*) By medicine†. See also ante, tit. *Manslaughter.*

(*d*) By neglect to provide for children or imbecile persons‡.

the world at the time it was killed, or they *cannot convict* the prisoner. (*Rex* v. *Brain*, 1834, N. P., 6 C. & P. 349). An indictment charged that the prisoner, being big with child, did bring forth the child alive, and afterwards strangle it:—Held, that the jury ought not to convict on this indictment, unless they are satisfied that the child was wholly born when it was strangled; (*Rex* v. *Crutchley*, 1837, N. P., 7 C. & P. 814): and that it was actually and entirely born in a living state; proof of having breathed is not decisive that it was born alive. (*Rex* v. *Sellis*, 1837, N. P., 7 C. & P. 850). On a charge of child murder, it appeared that the child must have died before it had an independent circulation:—Held, that, as the child had never had an independent circulation, the charge of murder could not be sustained. On an indictment for child-murder, no one but the mother can be convicted of a concealment of the birth of the child. (*Reg.* v. *Wright*, 1841, N. P., 9 C. & P. 754).

On an indictment under 1 Vict. c. 85, s. 2, against husband and wife, for violently beating a child with intent to murder:—Held, that the jury must be satisfied of an actual intent; and it is not sufficient that, if death had ensued, the offence would have been murder; and where a party is charged with aiding and abetting, the jury must find that the latter was aware of the intent of the principal to commit the offence of murder:—Held, also, the jury convicting only of the assault, the wife was not protected from the presumption of having acted under coercion. (*Reg.* v. *Cruise*, 1838, N. P., 8 C. & P. 541).

* If two persons fight, and one overpower the other and knock him down, and put a rope round his neck and strangle him, this will be murder. (*Rex* v. *Shaw*, 1834, N. P., 6 C. & P. 372).

The case of *Rex* v. *Grindley*, in which it was said that the intoxication of a party charged with murder was a proper circumstance to be taken into consideration, in order to shew whether the act was premeditated, or done only with sudden heat and impulse, is not law. (*Rex* v. *Carroll*, 1835, C. C. C., 7 C. & P. 145, overruling *Rex* v. *Grindley*, cited 1 Russell on C. & M., p. 8, 2nd ed.).

In a case of death by stabbing, if the jury are of opinion that the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might be considered at the moment as not being the master of his own understanding, the offence will be manslaughter; but if there had been, after the provocation, sufficient time for the blood to cool, and for reason to resume its seat before the mortal wound was given, the offence will amount to murder; and if the prisoner displayed thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion. (*Rex* v. *Hayward*, 1833, N. P., 6 C. & P. 157).

† A party who gives laudanum to a nurse to administer to a child to destroy it, but who does not do so, and puts the bottle on the mantelpiece, and another child by mistake takes the poison, is guilty of murder. (*Reg.* v. *Michael*, 1840, C. C. C., 9 C. & P. 356; S. C. 2 Moo. C. C. 120).

‡ Where the prisoner undertook the care of an aged and imbecile person, and by keeping her in a confined and unhealthy place, and by neglect to provide proper food, &c., occasioned her death:—Held, that if the jury were satisfied, from the gross and wilful neglect, that the prisoner contemplated the death of the party, he would be guilty of murder; and if guilty of such neglect, although he did not contemplate death, he would be guilty of manslaughter. (*Rex* v. *Marriott*, 1838, C. C. C., 8 C. & P. 425). Where the prisoner, a married woman, was charged with the murder of her illegitimate child, by neglecting to supply it with food:—Held, that she being the servant of the husband, she was not chargeable for acts of omission, unless she omitted to give such food as had been provided for it by the husband. (*Rex* v. *Saunders*, 1836, N. P., 7 C. & P. 277).

(*e*) By suicide, agreement to commit*.

(*f*) Of unnatural offence†.

III. RELATIVE TO PARTICULAR PERSONS.

(*a*) Constables, sheriffs' officers, &c.‡

(*b*) Gamekeepers§.

* If two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder. (*Reg.* v. *Alison*, 1838, C. C. C., 8 C. & P. 418).

† If a father see a person in the act of committing an unnatural offence with his son, and instantly kill him, it seems that it will be only manslaughter, and that of the lowest degree; but if he merely hear of it, and go in search of the party, and meeting him, strike him with a stick, and afterwards stab him with a knife, and kill him, in point of law it will be murder.) *Reg.* v. *Fisher*, 1837, C. C. C., 8 C. & P. 182).

‡ Where a party was wrongfully arrested and detained by a constable on a charge of assault, not taking place in his presence, and having, whilst in such custody, struck a party assisting the constable having him in charge, for which the constable also said he should take him before a magistrate; whilst proceeding thither the prisoner in resisting had struck the party with a knife, for which he was indicted under 43 Geo. 3, c. 58:—Held, that, as he might be considered still acting under the provocation of the original wrongful arrest, and it would not therefore have amounted to murder, he was entitled to an acquittal. (*Rex* v. *Curvan*, 1826, 1 Moo. C. C. 132). Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the prisoner has done nothing for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer do not notify to him that he has such a charge. (*Rex* v. *Woolmer*, 1832, 1 Moo. C. C. 334). If commissioners of a bankrupt issue a warrant to apprehend a bankrupt, and direct the warrant to "J. A. and W. S., our messengers and their assistants," &c.; this warrant does not justify the apprehension of the bankrupt by any one who is not in the presence, actual or constructive, of J. A. or W. S.; and therefore B., who was the assistant of W. S. in his business of a sheriff's officer, is not justified in apprehending the bankrupt in the absence of W. S. and J. A., although B. has the warrant in his possession:—Held, also, that if B., in attempting to take the bankrupt, be struck down by the bankrupt with a stone, and, in a struggle which ensued, have a part of his nose bitten off by the bankrupt, this, in case death had ensued to B., would have been a case of manslaughter only. (*Rex* v. *Whalley*, 1835, N. P., 7 C. & P. 245). If the servant of the owner of property find a party actually committing an offence against the statute 7 & 8 Geo. 4. c. 29, (the Larceny Act), and apprehend him under section 63 of that act, and while taking the party to a magistrate, such party kill him, this will be murder; but if the servant *either* did not see him in the actual commission of the offence, or be taking him to any other place than before a *magistrate*, it will not be murder. (*Rex* v. *Curran*, 1828, N. P., 3 C. & P. 397).

§ If a gamekeeper strike in resisting violent attacks made upon him when attempting to apprehend, and he be afterwards killed, it would amount to murder, and a wound given within 6 Geo. 4, c. 51, s. 2. (*Rex* v. *Ball*, 1832, 1 Moo. C. C. 333). A gamekeeper or other person lawfully authorized under 9 Geo. 4, c. 69, s. 2, may apprehend persons found offending under that act, without giving notice of his purpose. (*Rex* v. *Payne*, 1833, 1 Moo. C. C. 378). Under 9 Geo. 4, c. 69, s. 2, a keeper, &c., may apprehend poachers, though there are three or more, found armed; for the section only authorizes apprehending for what are offences under sect. 1, and where there are three or more arrested, they are punishable under sect. 9; yet, what is punishable under sect. 9 is nevertheless an offence under sect. 1, though the circumstances of aggravation make it liable to a heinous punishment; and if the keeper, &c., be killed in the attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender, or any of his party, if he struck in self-defence only, and to diminish the violence illegally used against him, and not vindictively to punish. (*Rex* v. *Ball*, 1832, 1 Moo. C. C. 330).

IV. RELATIVE TO THE INQUISITION*.

V. RELATIVE TO THE INDICTMENT†.

VI. RELATIVE TO THE EVIDENCE‡.

* Where the inquisition stated beating with a poker on the head by A. on one day, and a kick on the belly by B. on another day, of which the deceased respectively languished until &c., and then died of the said blows on the head, together with the bruises and contusions on the belly, and that so the said A. and B. the said deceased did kill &c.:—Held bad. (*Reg.* v. *Devett*, 1838, C. C. C., 8 C. & P. 639).

† Where the indictment charged the death to have been by striking with a piece of brick, &c., the fact being that the prisoner struck him with his fist down upon a brick-floor, and that the fall upon the brick was the cause of death:—Held, that the means were not truly stated. (*Rex* v. *Kelly*, 1825, 1 Moo. C. C. 113.—S. P. *Rex* v. *Thompson*, 1826, Id. 139).

Where the child was illegitimate, and the only evidence of the surname of Waters was that of a person who took it to be baptized, and said it was Eleanor Waters' child. Semble, insufficient proof of its having acquired that name. (*Rex* v. *Waters*, 1835, N. P., 7 C. & P. 250). Indictment for murder of a bastard child, to the "jurors unknown," it appearing to have been only twelve days old, and not to have been baptized:—Held, that the conviction was proper, although upon two occasions the mother had been heard to call it "Mary Ann," and "little Mary," and that she should like to have it named Mary Ann. (*Rex* v. *Smith*, 1833, N. P., 6 C. & P. 151). But an indictment against a married woman for the murder of her illegitimate child stated, that she "in and upon a certain infant male child of tender age to wit, of the age of six weeks, and not baptized, feloniously and wilfully," did make an assault, &c.:—Held, that this description was not sufficient: it neither stated the name of the child, nor stated it to be to the jurors unknown. (*Reg.* v. *Biss*, 1838, N. P., 8 C. & P. 773).

A woman charged with the murder of her husband was described as "A., the wife of I. O., late of the parish of S., in the county of W., labourer." The Judge at the trial ordered this to be amended by striking out the word "wife" and inserting the word "widow." (*Reg.* v. *Orchard*, 1838, N. P., 8 C. & P. 565).

In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe either the length, breadth, or depth of such wound. (*Rex* v. *Tomlinson*, 1834, N. P., 6 C. & P. 370).

‡ Where the motive to commit murder was to prevent the party discovering the previous murder of another:—Held, that the circumstances of that case were inadmissible in evidence upon the trial of parties charged with the second murder. (*Rex* v. *Clewes*, 1830, N. P., 4 C. & P. 221).

If, in a case of murder, the death of a deceased is charged to be suffocation by placing the hand on the mouth of the deceased:—Held, that this allegation is made out if the jury are satisfied that any violent means were used to stop the respiration of the deceased. (*Rex* v. *Waters*, 1835, N. P., 7 C. & P. 250). So, an indictment, alleging the prisoner to have suffocated the party by placing both her hands about the neck:—Held, sufficiently proved, although one hand was placed on the mouth and the other at the back of the neck, it being the same kind of death; and that it was not necessary to prove that it was done by the hands of the prisoner if she was privy and so near as to be able to assist. (*Rex* v. *Calkin*, 1831, O. B., 5 C. & P. 121). So, a charge of murder by cutting the throat:—Held supported, although the part cut was only what may be commonly called, although not scientifically, "the throat." (*Rex* v. *Edwards*, 1834, N. P., 6 C. & P. 401). So, where the wound was stated by the surgeon to have been partly cut and partly torn, and done by an instrument not sharp:—Held sufficient to support the indictment; which alleged it to have been "with a certain sharp instrument;" the degree of sharpness being immaterial. (*Rex* v. *Grounsell*, 1837, N. P., 7 C. & P. 788).

On a charge of murder, the evidence shewing the body to be of a different party:—Held, that until proof of the actual death of the party alleged to have been

VII. RELATIVE TO THE VERDICT*.

VIII. RELATIVE TO THE EXECUTION. See 6 & 7 Will. 4, c. 30.

IX. RELATIVE TO MURDER ABROAD†.

Navigable Canal. See tit. *Canal.*

Navigable River. See tit. *River.*

Navigation and Navigation Act. See tits. *Ship and Shipping.*

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killed, the prisoner could not be called on to give any account. (*Reg.* v. *Hopkins*, 1838, N. P., 8 C. & P. 591).

On a trial for murder, the deposition on oath of the prisoner, taken before the coroner on the inquest held on the body of the deceased, is not receivable in evidence. (*Reg.* v. *Owen*, 1840, N. P., 9 C. & P. 238). But, on an indictment for murder of A. by poison:—Held, that the dying declarations of B., who died also of the same cause, were admissible. (*Rex* v. *Baker*, 1836, N. P., 2 M. & Rob. 53).

In a case of concealment of birth under the stat. 9 Geo. 4, c. 31, s. 14, it is essential to the commission of the offence that the prisoner should have done some act of disposal of the body after the child was dead; therefore, if the prisoner had gone to a privy for another purpose, and the child came from her unawares and fell into the soil and was suffocated, she must be acquitted of this charge notwithstanding her denial of the birth of the child. (*Reg.* v. *Turner*, 1839, N. P., 8 C. & P. 755). It is not sufficient proof of the child being born alive that it has breathed in the progress of its birth:—Held also, that a declaration by the mother that the father of the child had lately got married was sufficient to support the allegation of its being born a bastard, which is a fact necessary to be proved. (*Rex* v. *Poulton*, 1832, O. B., 5 C. & P. 329).

* Where a party is indicted as an accessory after the fact with the principal in a case of murder:—Held, that if the latter is found guilty of manslaughter only, the former may be found guilty as accessory to the lesser offence: the question for the jury in such cases is, whether the prisoner, knowing the offence to have been committed, was assisting in concealing the offence, or in any way aiding the offender to escape justice. (*Rex* v. *Greenacre*, 1837, C. C. C., 8 C. & P. 32). Where the parties were charged as accessories to murder, the principal being insane:—Held, that they could not be convicted on that count; but, if aware of the malignant purpose of such insane party, they entertain it and share in that purpose with him, and are present aiding and abetting and assisting him in the commission of acts fatal to life, they are principals for what is done by his hand. (*Reg.* v. *Tyler*, 1838, N. P., 8 C. & P. 616).

† Upon a prosecution for a murder committed abroad by one subject upon another under 9 Geo. 4, c. 31, s. 7:—Held, that, in order to convict, the jury must be satisfied that the prisoner was a British-born subject; but, that the declaration of the prisoner as to where he was born, unexplained, was as against himself evidence to go to the jury. (*Rex* v. *Helsham*, 1830, O. B., 4 C. & P. 394).

Negligence.

See tits. *Accident—Attorney—Carrier—Driving—Manslaughter—Murder—Sheriff—Surgeon.*

I. RELATIVE TO WHEN AN ACTION CAN BE MAINTAINED.

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I. RELATIVE TO WHEN AN ACTION CAN BE MAINTAINED.

(*a*) In general.

Jarvis *v.* Dean, E. T. 1825. C. P. 3 *Bing.* 447.

A thoroughfare may be presumed to be a highway, to render a party liable for negligence*.

In an action for an injury sustained by negligence of the defendant, in leaving open the area of his house, it appeared that there had been a thoroughfare through an unfinished street for five years.

The Court held, that the jury were warranted in presuming that it was used with the full assent of the owners of the soil, and a dedication presumed, to justify the allegation that it was a common public highway.

* In an action against the captain of a steam-vessel, for swamping a loaded wherry on the river, by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone; and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own improper conduct, either in his managing or overloading the boat, they must find their verdict for the defendant. (*Luxford* v. *Large*, 1833, N. P., 5 C. & P. 421).

(*b*) In particular.

1. *In Buildings, pulling down.*

PEYTON *v.* MAYOR OF LONDON, T. T. 1829. K. B. 9 *B. & C.* 725.

A reversioner in an action for pulling down an adjoining building must allege want of notice*; and shew that he had right to support from adjoining building.

THIS was an action on the case by the reversioner against the owners of the adjoining house for pulling it down, without sufficiently shoring up the plaintiff's house, whereby &c.; a second count alleged, that the defendants negligently and improperly &c. conducted themselves in pulling down, whereby &c.

The Court held, 1st, that the action could not be supported, on the ground of the defendants not having given notice of their intention to pull down, it not being alleged as a cause of injury; and, 2ndly, that there being no evidence from which it might be inferred that the plaintiff had a right to the support of the adjoining house, it was the plaintiff's duty to protect his own house by shoring within, and that he could not complain of the defendants' neglecting to do it.

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2. *By Fire.*

VAUGHAN *v.* MENLOVE, H. T. 1837. C. P. 3 *Bing. N. S.* 468; S. C. 4 *Scott*, 244; S. C. 7 *C. & P.* 525.

By making a hay-rick whereby a fire was occasioned renders the party liable.

THE defendant, who was a farmer, had made up a large stack of hay upon his own premises; whilst the work was in progress he was told that the hay was too green, and advised to make some alteration in order to prevent bad consequences. To these suggestions he appeared to pay little attention, and satisfied himself with removing some of the hay from the upper part, and placing it in a lower situation in the stack. Upon the stack being completed and symptoms of danger appearing from the smoke, he was again warned of the danger by the neighbouring farmers, and advised to re-make the stack; he however retained his indifference upon the matter, and said, in answer, that "he would chance it;" finally ignition did take place, and the stack, a valuable farm of the defendant's, contiguous thereto, and several cottages of the plaintiff's, contiguous to the barn, were consumed. The action was brought for the injury thereby sustained.

Per Cur.—The action is maintainable. It is not sufficient for

* Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of which one of the walls of such adjoining premises rested; it was held, that the party giving the notice was only bound to use reasonable and ordinary care in the work, and was *not* bound to *secure* in any other way the adjoining premises from injury, although from the peculiar nature of the soil he was compelled to lay the foundation of his new building several feet deeper than that of the old. (*Massey* v. *Goyder*, M. T. 1829, N. P., 4 C. & P. 161). In an action for an injury to the plaintiff's premises in consequence of the pulling down of the defendant's house adjoining, the plaintiff may recover damages for any injury actually caused by the negligence of the defendant, although he has not himself used those precautions which it was his duty to adopt against such injury. (*Walters* v. *Pfiel*, T. T. 1829, N. P., 1 M. & M. 362).

the defendant to have acted bonâ fide; he is bound to exercise in the management of his property that degree of care, caution, and skill, which a man of ordinary prudence is required to exhibit under similar circumstances.

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3. *By leaving Horses*.*

4. *By leaving an Opening†.*

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5. *With respect to Ships.*

VENNALL *v.* GARNER, M. T. 1832. Ex. 1 *C. & M.* 21; S. C. 3 *Tyrw.* 85.

The lightest ship should give way‡.

THE defendant's ship was light and had the wind, the plaintiff's being heavily laden and bearing against the wind—

The Court held, that the defendant was to be deemed wholly in fault, although the plaintiff ought perhaps to have avoided the collision, if he had not omitted to do so in the expectation, which he might reasonably entertain, that the defendant would do that which was his duty.

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6. *By Undermining.*

DODD *v.* HOLME, T. T. 1834. K. B. 3 *N. & M.* 739; S. C. 1 *Ad. & E.* 493.

In laying a foundation, if a party negligently under-

IN case for negligently excavating in laying the foundation of a wall at the extremity of the defendant's own land, whereby the house of the plaintiff adjoining was injured.

* If a horse and cart are left standing in the street without any person to watch them, the owner is liable for any damage done by them, though it be occasioned by the act of a passer-by in striking the horse. (*Illidge* v. *Goodwin*, M. T. 1831, N. P., 5 C. & P. 190).

† A publican, who has a flap door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury by it. (*Proctor* v. *Harris*, T. T. 1830, N. P., 4 C. & P. 337). A tradesman who has a cellar opening upon the public street, is bound when he uses it to take reasonable care that the flap of it is so placed and secured as that, under ordinary circumstances, it shall not fall down; but, if the tradesman has so placed and secured it, and a wrong-doer throws it open, the tradesman will not be liable in damages for any injury occasioned by it. (*Daniels* v. *Potter*, H. T. 1830, N. P., 4 C. & P. 262).

‡ The question in what is called a running-down case is, whether the plaintiff by his negligence or improper conduct substantially contributed to the occurrence of the injury of which he complains, not to the amount of it but to its occurrence. Therefore, where a brig was carrying the anchor in a position contrary to the by-laws of the river Thames, at the time when she came in collision with a barge, it was held, that the improper carrying of the anchor would not of itself be sufficient to make the owner of the brig responsible in damages, if the barge, by departing from the known rule of the river, brought herself into the situation in which the brig struck her, although, but for the position of the anchor, the collision would not have produced the injury complained of. The deposition of a witness taken before the coroner on inquiry touching the death of the person killed by the collision, is receivable in evidence in the action for damages if the witness be shewn to be beyond the seas. (*Sills* v. *Brown*, M. T. 1840, N. P., 9 C. & P. 601).

mine he is liable;

The Court held, that the question for the jury was, whether the defendant negligently and carelessly dug, &c., as being the occasion of the damage; however insufficient or dilapidated the neighbouring house might be, a party has no right, by any negligent acts on his premises, to accelerate its fall.

WYATT *v.* HARRISON, T. T. 1832. K. B. 3 *B. & Ad.* 871.

but the owner of a recent-built house cannot sue for "digging so near" as to cause damage*.

ACTION on the case. On demurrer it appeared that the owner of a modern house, built at the extremity of his land, had brought an action against the owner of the adjoining land for digging so near that the house fell in—

The Court allowed the demurrer to so much of the declaration as alleged the injury to have occurred by "digging so near." If the house had been ancient, from whence the consent of the former adjoining proprietor might have been presumed to the placing the additional weight at the extremity, it would be different.

II. RELATIVE TO BY AND AGAINST WHOM MAINTAINABLE.

STOREY *v.* RICHARDSON, M. T. 1839. C. P. 6 *Bing. N. S.* 123; S. C. 8 *Scott*, 291.

One party aggrieved under a joint retainer may sue alone.

PLAINTIFF and his two partners employed defendants as accountants for hire, to make out the accounts of the firm and of the separate balance of each partner. Defendants made out plaintiff's separate balance so erroneously and negligently, that, relying on their statement, he was a considerable loser thereby.

The Court held, that plaintiff might sue alone in case for this misfeasance; and that it was no variance to allege that he had employed defendants.

RANDELSON *v.* MURRAY, T. T. 1838. Q. B. 3 *N. & P.* 239.

To render a party liable the persons engaged need not be his servants†.

THE defendants hired a master porter to remove a barrel of flour from their warehouse, and the latter hired a carman, and both these men were engaged unloading it; in doing which it fell upon and injured the plaintiff through the defectiveness of the rope furnished by the porter.

The Court held, that the defendants were liable, it being immaterial whether they employed their own servants or engaged others more expert, and left the removal to their own superintendence.

* Where a public company has the right by law of taking up the pavement of the street for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the king's subjects, themselves using reasonable care, from injury; and if they so lay the stones as to give such an appearance of security as would induce a careful person using reasonable caution to tread upon them as safe, when in fact they are not so, the company will be answerable in damages for any injury such person may sustain in consequence. (*Drew* v. *New River Company*, M. T. 1834, N. P., 6 C. & P. 754).

† In an action for damage done to the plaintiff's tug-boat by the negligence of the defendant's servant in the defendant's barge, it was proved that the barge was

III. RELATIVE TO THE REMEDY CONNECTED WITH.

(*a*) Declaration.

Curtis *v.* Drinkwater, E. T. 1831. K. B. 2 *B. & Ad.* 169.

If a party be injured in one county and is subsequently removed into another, where expense is also incurred, the venue may be laid in the latter as to material evidence.

The plaintiff, sitting on a coach with her back to the luggage, without any railing between, was by a sudden jerk thrown off and had her leg broken. The accident happened in the county of O., and after remaining there a considerable time she removed into the county of W. before she was fully recovered, and had medical assistance there.

The Court held, that the inconvenience and expense incurred there was a sufficient compliance with the undertaking to give material evidence in W.; and, the jury having found for the plaintiff on the ground of the improper construction of the coach and disposition of the luggage, that they were properly directed to find for the plaintiff, if they thought that the injury was occasioned by the negligence of the defendant or his servant.

Bucknell *v.* Phillips, E. T. 1839. C. P. 7 *Scott*, 129.

Mere convenience of calling scientific witnesses no ground for changing the venue.

In an action for running down a vessel, the venue being laid in London—

The Court held, that the mere convenience of calling scientific witnesses in Liverpool, and not to prove facts, was not a sufficient ground for taking away the plaintiff's right of laying it where he had thought fit.

(*b*) Pleas.

Cross Keys Company *v.* Rawlings, E. T. 1836. C. P. 3 *Bing. N. S.* 71; S. C. 3 *Scott*, 490.

Under a traverse of the injury, the defendant may shew no neglect.

In case, for injuring a bridge by negligence in navigating; the plea, after alleging that the plaintiff had wrongfully narrowed the channel, traversed that the injury was occasioned by any carelessness of the defendant.

The Court held, that they were at liberty under such plea, upon failing to establish any default in the plaintiff, to shew also that they themselves had not been guilty of negligence.

the defendant's, but the plaintiff's witness could not identify the bargeman who was steering the barge:—Held, that this was primâ facie evidence that the barge was steered by the defendant's servant, and that if the barge was on hire or was taken by any other person, it lay on the defendant to shew that. (*Joyce* v. *Capel*, E. T. 1838, N. P., 8 C. & P. 370). But, where a van was standing at the door of A., from which A.'s goods were unloading, and A.'s gig was standing behind the van, B.'s coachman, who was driving B.'s carriage, came up, and there being room for the carriage to pass, the coachman got off his box and laid hold of the van-horse's head, this caused the van to move, and thereby a packing-case fell out of the van upon the shafts of the gig and broke them:—Held, that B. was not liable for this, as the coachman was not acting in the employ of B. at the time this matter occurred. (*Lamb* v. *Palk*, 1839, N. P., 9 C. & P. 629).

ARMITAGE *v.* GRAND JUNCTION RAILWAY, H. T. 1838. Ex. 6 *D. P. C.* 340; S. C. 3 *M. & W.* 244.

Defendant cannot plead both to blame.

IN case, for damage by negligence in conducting railway carriages; plea, that the damage was occasioned by the negligence of both parties—

The Court held the plea bad in substance, as amounting to the general issue.

(*c*) EVIDENCE.

SYBRAY *v.* WHITE, E. T. 1836. Ex. 1 *M. & W.* 435.

A consent to be bound by a miners' jury is evidence*.

IN case, for loss of a horse, by falling down a shaft in possession of defendant, who denied it to be his, but had said, that, if a miners' jury shewed it was his, he would be answerable. A jury having met, they by writing found that it was.

The Court held, that such finding, coupled with the defendant's declaration, was admissible, and was evidence of the fact of possession, and need not be stamped as an award, not on the face of it purporting to be one.

(*d*) WITNESSES†.

(*e*) DAMAGES‡.

* In an action for negligence, the declaration stated that the plaintiff had agreed to become a passenger by the defendant's omnibus, and that the defendant received the plaintiff as such passenger; plea, that the plaintiff did not become a passenger, and that the defendant did not receive him as such. It appeared that the plaintiff held up his finger to the driver of the omnibus, who stopped to take him up, and that, just as the plaintiff was putting his feet on the step of the omnibus, the driver drove on, and the plaintiff fell on his face on the ground:—Held, that this was evidence to go to the jury in support of the declaration, as the stopping of the omnibus implied a consent to take the plaintiff as a passenger. (*Brien* v. *Bennett*, H. T. 1839, N. P., 8 C. & P. 724). So, in an action for damage done to the plaintiff's tug-boat, by the negligence of the defendant's servant in steering the defendant's barge, it was proved that the barge was the defendant's, but the plaintiff's witness could not identify the bargeman who was steering the barge:—Held, that this was primâ facie evidence that the barge was steered by the defendant's servant; and that it was for the defendant to rebut it. (*Joyce* v. *Capel*, E. T. 1838, N. P., 8 C. & P. 370).

† Where, in an action on the case for injury to the plaintiff's premises, by the improperly digging a cellar near them:—Held, that the workman could not be called without a release, it not being a case within 3 & 4 Will. 4, c. 42, s. 26. (*Mitchell* v. *Hunt*, 1834, N. P., 6 C. & P. 351).

‡ In an action for damage to the plaintiff's vessel by collision with the defendants', through negligence of the defendants' servants:—Held, that the defendants were not entitled to deduct the amount of damage received by the plaintiff from insurers. (*Yates* v. *White*, H. T. 1838, C. P., 4 Bing. N. S. 272). Where a plaintiff, in an action against an attorney for negligence in the conduct of a suit, alleges that he was "forced to pay" certain sums in consequence of the defendant's negligence, he can only recover the amount actually paid by him, although a liability to a greater amount on the part of the plaintiff has been incurred in consequence of the alleged negligence. (*Jones* v. *Lewis*, M. T. 1840, B. C., 9 D. P. C. 143).

(*f*) Verdict*.

(*g*) New trial.

Marriott *v.* Stanley, M. T. 1840. C. P. 9 *D. P. C.* 59; S. C. 1 *M. & G.* 568.

In case, for an injury sustained by the plaintiff, whose pony had run away and thrown him against iron improperly placed by the defendant in a public street, the judge having left to the jury, 1st, whether the act was done by the defendant, and, 2nd, whether the plaintiff had used due caution, and it did not appear on which ground the verdict was given—

If the verdict be unsatisfactory upon the evidence, the Court will grant a new trial.

The Court, not being satisfied as to the evidence upon one of them, granted the plaintiff a new trial, on payment of costs.

See Butterfield v. *Forrester*, 11 *East*, 59, *and Bridge* v. *Grand Junction Railway Company*, 3 *M. & W.* 244.

Jameson *v.* Dunkald, T. T. 1827. C. P. 12 *Moore*, 148.

In an action for running down the plaintiff's vessel, which was at the time sailing by or against the wind, the defendant's vessel sailing before the wind, and with studding sails set at night—

So, if the party's conduct be doubtful, a new trial will be granted.

The Court, doubting the propriety of such conduct, granted a new trial.

* Where, in an action on the case for damage by running foul of the plaintiff's vessel, the jury, on being asked as to the ground of their verdict in giving less than the damage proved, replied, that they considered there were faults on either side:—Held, nevertheless, that the plaintiff was entitled to recover, as, although in a degree in fault, semble, it must be such as tended to the injury, to preclude him from recovering. (*Raisin* v. *Mitchell*, M. T. 1839, N. P., 9 C. & P. 613).

END OF VOL. IV.

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